

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. ~~100~~ 338

SIMON TAYLOR, MELVINA TAYLOR, LEUB WILSON,
ET AL., PLAINTIFFS IN ERROR,

vs.

JOE ANDERSON, LABITHA ANDERSON, JESSE T. KINCAN-
NON, AND SIDNEY G. KINCANNON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF OKLAHOMA.

FILED SEPTEMBER 2, 1912.

(23,347)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 772.

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ET AL., PLAINTIFFS IN ERROR,

vs.

JOE ANDERSON, LABITHA ANDERSON, JESSE T. KINCAN-
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Complaint at Law.

In the United States Circuit Court, Eastern District of
Oklahoma.

Simon Taylor, Melvina Taylor, Leus Wilson, Anderson Wilson,
Lane Wilson, Bicy Wilson, George Victor, Nancy Vic-
tor, By, Eli P. Williams, Elmer Williams, and Charles
H. Williams, Attorney in fact for all of above named
parties, Plaintiffs,

vs.

Joe Anderson, Labitha Anderson, Jesse T. Kincannon, Sidney
G. Kincannon, Defendants.

The Plaintiffs state that they are the owners in fee of
the following described lands.

The Southwest Quarter of the Northwest Quarter and the
Southwest Quarter of the Southeast Quarter, and the West
Half of the Southeast Quarter of the Southeast Quarter of
Section Fourteen (14) and the West Half of the Southwest
Quarter of the Southeast Quarter of Section Fifteen (15),
Township One (1) North of Range Six (6) West, (Chickasaw
Nation), of the Indian Base and Meridian, in Oklahoma, con-
taining One Hundred and Twenty (120) A.

and that the defendants are in the unlawful possession of said
lands claiming the same as their own, and refuse to surrender
possession to plaintiffs or attorn to them, for the rents and
profits arising from said lands.

Mary Mitchell, a full blood Choctaw Indian was the allottee
of above described lands, and the title in fee was conveyed to
her by a duly executed allotment patent, a certified copy of
same is hereto attached and marked Exhibit "A" and made a
part hereof, and said patent contained the following
2 provision "subject, however, to the provisions of the
Act of Congress approved July 1, 1902, (32 Stat. 641.)
and Section 15-16-68 of said Act of Congress reads as follows:

"15. Lands allotted to members and freedmen shall not be
affected or encumbered by any deed, debt, or obligation of any
character contracted prior to the time at which said land may
be alienated under this Act, nor shall said land be sold except
as herein provided."

"16. All lands allotted to the members of said tribes, ex-
cept such lands as is set to each for a homestead as herein

provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years and the balance in five years; in each case from date of patent; provided, that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value."

"68. No act of Congress or treaty provision, nor any provision of the Atoka Agreement, inconsistent with this agreement shall be in force in said Choctaw and Chickasaw Nations."

That after receiving her allotment, Mary Mitchell died intestate, leaving the plaintiffs as her sole and only heirs at law, and who are the owners in fee of the above described lands, who are now, and have been ever since the death of said Mary Mitchell, entitled to the possession of said lands.

Above described lands are reasonably worth the sum of Five Thousand Dollars, and the reasonable annual rental value of above described lands [in] Two Hundred and Fifty Dollars per year, and the plaintiffs are entitled to recover the sum from the defendants as rent for said lands, for each and every year since Jan. 1, 1906,

If the said defendants have any pretended title or deed to said lands, the same is void and of no force and effect for said pretended title or deed was made in violation of the Act of Congress approved July 1, 1902, and referred to above, and [if] therefore void, on its face, and no one claiming possession as tenants or claiming any interest of any kind in said lands or the rents thereon under or through said defendants has any right to possession nor any interest of any kind in said lands or the rents thereof.

3 The issues involved in this action raise a Federal question, to-wit: the construction of an Act of Congress approved July 1, 1902, and entitled "An Act of Ratify and Confirm an Agreement with the Choctaw and Chickasaw Tribes of Indians and for other Purposes," and for that reason this court has jurisdiction of this action.

For the authority to bring this suit, see copies hereto attached of the Powers of Attorneys of all the plaintiffs in this suit and said copies are marked Exhibits "B", "C", "D" and "E", and made a part hereof.

Wherefore, the plaintiffs pray for a judgment cancelling and annulling the pretended title or deed of said defendants, and all interest in said lands and rents thereof, claimed by any

person holding under or through said defendants, and for a judgment for the possession of said lands, and a judgment for the rents of said lands in the sum of Two Hundred and Fifty Dollars for each and every year since Jan. 1, 1906, and costs in this case, and such and further orders be made in the premises as will fully protect the rights of the plaintiffs.

MAXEY & RUNYAN,
Attorneys for plaintiffs.

N. B. Maxey being duly sworn states that he is one of the attys for the Plaintiffs, who are absent from Muskogee County, Oklahoma and that he makes this affidavit for and on behalf of said plaintiff and says that he is familiar with the matter alleged in the foregoing petition and the same are true as he believes.

N. B. MAXEY.

Subscribed and sworn to before me this 15th day of July 1908.

(Seal)

L. G. DISNEY,
Clerk.

By Florence Hammersley, D. C.

4 Allotment Patent to Mary Mitchell.

Exhibit A.

(185A)

Allotment Patent.

Choctaw By Blood Roll No. 14561
Date of Certificate July 28, 1903

The Choctaw and Chickasaw Nations,
(Formerly Indian Territory)
Oklahoma.

To all to whom These Presents shall come—Greeting:

Whereas, By the Act of Congress approved July 1, 1902, (32 Stat., 641), and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw Nations land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations; and,

Whereas, It was provided by said Act of Congress that each member of said tribes shall, at the time of the selection of his allotment, designate, or have selected and designated for him, from his allotment, land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and

Chickasaw Nations, as nearly as may be, as a homestead, for which separate certified and patent shall issue; and,

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Mary Mitchell a citizen of the Choctaw Nation, as an allotment, exclusive of land equal in value to one hundred and sixty acres of the average allottable lands of the Choctaw and Chickasaw Nations selected as a homestead as aforesaid:

Now Therefore, We, the undersigned, Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the twenty-ninth section of the Act of Congress of the United States, approved June 28, 1898, (30 Stat., 495), have granted and conveyed, and by these presents do grant and convey unto the said Mary Mitchell all right, title, and interest of
5 the Choctaw and Chickasaw Nations and of all other citizens of said Nations, in and to the following described land, viz:

The South west Quarter of the North West Quarter and the South West Quarter of the South East Quarter and the West Half of the South East Quarter of the South East Quarter of Section Fourteen (14) and the West Half of the South West Quarter of the South East Quarter of Section Fifteen (15) Township One (1) North and Range Six (6) West, (Chickasaw Nation),

of the Indian Base and Meridian, in Oklahoma, containing One Hundred and Twenty (120) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the provisions of the Act of Congress approved July 1, 1902 (32 Stat. 641).

In Witness Whereof, We, the principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the Great Seal of our respective Nations to be affixed at the dates hereinafter shown.

Date, July 19, 1905.

(Seal)

GREEN McCURTAIN,
Principal Chief of the Chickasaw Nation.

Date, September 20, 1905.

(Seal)

DOUGLAS H. JOHNSTON,
Governor of the Chickasaw Nation.

Department of the Interior,

L. R. S. Approved Oct. 31, 1905, 190..

ETHAN A. HITCHCOCK,

Secretary.

By Oliver A. Phelps, Clerk.

Filed for record on the 7 day of Nov., 1905, at 9 o'clock A. M.

Department of the Interior, Commissioner to the Five
Civilized Tribes,

This is to certify that I am the officer having custody of the record of Patents of the Choctaw & Chickasaw Nations and that the above and foregoing is a true and correct copy of the Allotment of Mary Mitchell as the same appears of record in Book 6, Page 151 of Allotment Patent Record.

In Testimony whereof witness my hand this 26 day of May, 1908.

By Wm. T. Martin, Clerk.

J. G. WRIGHT,

Commissioner to the Five Civilized Tribes.

6 Power of Attorney, Melvina Taylor and husband to Eli P. Williams, et al.

Exhibit B.

Form G-2

Choctaw Roll No. ..

Section 1. Know all Men by These Presents That I Melvina Taylor and Simon Taylor, her husband, Post office address Garvin, Ok., represent that I am years old, in consideration of Ten Dollars to me in hand paid, the receipt of same is hereby acknowledged and other valuable and sufficient considerations, I do by these presents appoint, constitute and nominate Eli P. Williams, Elmer Williams and Charles H. Williams, my sole and only true and lawful agents and attorneys in fact, hereafter called my agents, they to act either jointly or severally, [will] full, sole and absolute power to do any and all acts, at any time that I could lawfully do myself—had I not executed this power of attorney—which in any way relate to all the lands and to any part of the land described hereinafter called said lands, and the possession, control, rents, income and profits thereof located in Oklahoma, to-wit:

The SW/4 of NW/4 and SW/4 of SE/4, and W/2 of SE/4 of SE/4 of Section 14, and W/2 of SW/4 of SE/4 of Section 15, in Township 1, North, Range 6 West, Stephens County, State of Oklahoma.

My agents are hereby authorized to bring the law suits referred to in Section 8 of this Power of Attorney at once or at any date my agents may elect, and my agents are authorized to bring said law suits, should my agents so elect in my name, by Eli P. Williams, Elmer Williams and Charles H. Williams, Attorneys in fact.

Section 2. I hereby assign, transfer and deliver to my agents all of my right to the possession of said lands and improvements thereon and I agree within one year from this date to put my agents in actual and absolute possession thereof and my agents when put in possession as aforesaid, to advance to me on demand fifty dollars on this Power of Attorney and should I from any cause fail to furnish possession as above provided my agents are hereby authorized to acquire possession of said lands and improvements at any time during the life of this Power of Attorney and to do any acts necessary in their opinion to acquire possession, and when in possession agree to rent, manage and look after said lands and improvements.

7 My agents have full, sole and absolute authority to collect and receive all moneys, rents and income of any kind now due or that hereafter become due from said lands, and my agents agree during my life to account to me and after my death to account to my heirs, executors and administrators for all moneys, rents and income received by them on account of my interest in said lands, less all expenses and less eight per cent on the amount actually received by them. Said eight per cent I allow my agents in full payment for their services for managing, renting or disposing of my interest in said lands. And I further agree not to assign or transfer all or any part of said moneys, rents and income.

Section 3. I hereby sell, convey, transfer and deliver to my agents an absolute interest in fee simple in all of the rents from said lands now due and that hereafter become due before the expiration of this Power of Attorney and in all of the improvements on said lands and agree that this Power of Attorney is coupled with an interest in all of said rents and improvements.

Section 4. I hereby sell, convey and transfer to my agents an absolute interest in fee simple in all and in any part of said lands that I can lawfully sell or alienate.

Section 5. My agents are hereby given full, sole and absolute power (at any date when I could lawfully sell—if this Power of Attorney had not been executed—all or any part of said lands whether that date is the present date or some future date) to sell in whole or in part on such terms and conditions

as they may see fit for cash or on time all of my interest in said lands, and to convey and transfer same by deed in fee simple, in whole or in part and to receive the consideration of such sales and to do any other acts that in any way relate to said sales. Provided, that said sale or sales shall be advertised by my agents in some newspaper published in the Recording District or in the County, where said lands are located, for not less than four weeks, giving the date and terms of said sale and said lands are to be sold to the highest bidder.

8 Provided further that my agents have the right to reject all bids if in their opinion said lands have not sold for a fair price. Provided further, that said sale is subject to the approval or disapproval of the judge of the District Court where said lands are located and should said judge fail or refuse to pass upon said sale for sixty days after an application in writing has been presented to him requesting that he pass upon said sale, in that event, said sale shall become binding without the approval of said judge.

Section 6. This Power of Attorney shall continue in full force until the thirty-first day of December, nineteen hundred thirty-nine, and shall expire on said date and I agree that this Power of Attorney shall not be determined by my death but shall continue in full force and effect until the last mentioned date, and my agents have full, sole and absolute power in the event of my death to do any and all acts in their own name or names authorized to be done by this Power of Attorney, and I further agree for myself, my heirs, executors and administrators that this Power of Attorney shall not be revoked before the last mentioned date.

Section 7. Should any one or two of my agents die, this shall in no way effect the legal force and effect of this Power of Attorney, the survivors or survivors shall have the same full, sole and absolute power to act as if death had not occurred.

Section 8. My agents are authorized and have full, sole and absolute power to bring or defend, either in their own name or names or in my name, at their option, and dismiss any law suit that in any way relates to said lands, and improvements, possessions, income, rents and profits thereof and to prosecute said suits until finally adjudicated by the court of last resort.

9 Section 9. It is hereby stipulated and agreed that the consideration named in Section 1 and Section 2 of this Power of Attorney are valuable and sufficient considerations

and make all of the sections and parts of sections of this Power of Attorney binding obligations upon me and my agents and upon said lands and improvements, incomes, rents and profits thereof.

Section 10. Should any one or more of the sections herein or should any part of any section or sections herein from cause be declared void or inoperative, this fact shall in [ny] way affect the legal force and effect of the other sections and parts of sections of this Power of Attorney.

Section 11. I hereby ratify and confirm all the acts of my agents named herein and I hereby revoke and cancel all other Powers of Attorney and agencies, and the parties named herein are my sole and only authorized and acting agents and attorneys in fact.

This Power of Attorney contains the full agreement between the parties hereto and shall not be changed or altered unless the same is in writing and signed by all the parties, and no person has any authority to make any promise, representation or agreement which in any way changes or alters the terms and provisions of this Power of Attorney.

In witness whereof we have hereunto set our hands and seals.

Dated this 22 day of May 1908.

(Seal)

MELVINA TAYLOR,

(Seal)

SIMON TAYLOR,

(Seal)

ELI P. WILLIAMS,

(Seal)

ELMER WILLIAMS,

(Seal)

CHARLES H. WILLIAMS,

Witnesses to mark and Subscribing and attesting Witnesses.

.....
.....

(Copy.)

10

Acknowledgment.

State of Oklahoma,
Choctaw County—ss:

Before me the undersigned, a Notary Public in and for said County and State, on this the 22nd, day of May 1908, personally appeared Melvina Taylor and Simon Taylor, to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they had executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and official seal the day and year above written.

JOHN A. ARMSTRONG,
Notary Public.

My commission expires March 18th, 1911.

11 Power of Attorney, Anderson Wilson and wife to Eli P. Williams, et al.

Form G-2

Exhibit C

Choctaw Roll No.

Section 1. Know All Men by These Presents That I Anderson Wilson and Leus Wilson, his wife Post office address Garvin, Oka. represent that I am years old, in consideration of One Dollar to me in hand paid, the receipt of same is hereby acknowledged and other valuable and sufficient considerations, I do by these presents appoint, constitute and nominate Eli P. Williams, Elmer Williams and Charles H. Williams, my sole and only true and lawful agents and attorneys in fact, hereafter called my agents, they to act either jointly or severally, [will] full, sole and absolute power to do any and all acts, at any time that I could lawfully do myself—had I not executed this power of attorney—which is any way relate to all the lands and to any part of the land described hereinafter called said lands, and the possession, control, rents, income and profits thereof located in Oklahoma, to-wit:

The SW/4 of NW/4 and SW/4 of SE/4 and W/2 of SE/4 of SE/4 of Section 14, and W/2 of SW/4 of SE/4 of Section 15, all in Township 1, North, Range 6 West, Stephens County, Oklahoma.

My agents are hereby authorized to bring the law suits referred to in Section 8 of this power of attorney, at once, or at any date my agents may elect, and my agents are authorized to bring said law suits, should my agents so elect, in my name by Eli P. Williams, Elmer Williams and Charles H. Williams, Attorneys in fact.

Section 2. I hereby assign, transfer and deliver to my agents all of my right to the possession of said lands and improvements thereon and I agree within one year from this date to put my agents in actual and absolute possession thereof and my agents agree when put in possession as aforesaid, to advance to me on demand fifty dollars on this Power of Attorney and should I from any cause fail to furnish possession as above provided my agents are hereby authorized to acquire possession of said lands and improvements at any time during the life of this Power of Attorney and to do any acts necessary in their opinion to be done to acquire said

possession and when in possession agree to rent, manage and look after said lands and improvements.

12 My agents have full, sole and absolute authority to collect and receive all moneys, rents and income of any kind now due or that hereafter become due from said lands, and my agents agree during my life to account to me and after my death to account to my heirs, executors and administrators for all moneys, rents and income received by them on account of my interest in said lands, less all expenses and less eight per cent on the amount actually received by them. Said eight per cent I allow my agents in full payment for their services for managing, renting or disposing of my interest in said lands. And I further agree not to assign or transfer all or any part of said moneys, rents and income.

Section 3. I hereby sell, convey, transfer and deliver to my agents an absolute interest in fee simple in all of the rents from said lands now due and that hereafter become due before the expiration of this Power of Attorney and in all of the improvements on said lands and agree that this Power of Attorney is coupled with an interest in all of said rents and improvements.

Section 4. I hereby sell, convey and transfer to my agents an absolute interest in fee simple in all and in any part of said lands that I can lawfully sell or alienate.

Section 5. My agents are hereby given full, sole and absolute power (at any date when I could lawfully sell—if this Power of Attorney had not been executed—all or any part of said lands whether that date is the present date or some future date) to sell in whole or in part on such terms and conditions as they may see fit for cash or on time all of my interest in said lands, and to convey and transfer same by deed in fee simple, in whole or in part and to receive the consideration of such sales and to do any other acts that in any way relate to said sales. Provided, that said sale or sales shall be advertised by my agents in some newspaper published in the Recording District or in the County, where said lands are located, for not less than four weeks, giving the date and terms of said sale and said lands are to be sold to the highest bidder.

13 Provided further that my agents have the right to reject all bids if in their opinion said lands have not sold for a fair price. Provided further, that said sale is subject to the approval or disapproval of the judge of the District Court where said lands are located and should said judge fail or refuse to pass upon said sale for sixty days after an application in writing has been presented to him requesting that he pass

upon said sale, in that event, said sale shall become binding without the approval of said judge.

Section 6. This Power of Attorney shall continue in full force until the thirty-first day of December, nineteen hundred thirty-nine, and shall expire on said date and I agree that this Power of Attorney shall not be determined by my death but shall continue in full force and effect until the last mentioned date, and my agents have full, sole and absolute power in the event of my death to do any and all acts in their own name or names authorized to be done by this Power of Attorney and I further agree for myself, my heirs, executors and administrators that this Power of Attorney shall not be revoked before the last mentioned date.

Section 7. Should any one or two of my agents die, this shall in no way effect the legal force and effect of this Power of Attorney, the survivors or survivors shall have the same full, sole and absolute power to act as if death had not occurred.

Section 8. My agents are authorized and have full, sole and absolute power to bring or defend, either in their own name or names or in my name, at their option, and dismiss any law suit that in any way relates to said lands, and improvements, possessions, income, rents and profits thereof and to prosecute said suits until finally adjudicated by the court of last resort.

14 Section 9. It is hereby stipulated and agreed that the consideration named in Section 1 and Section 2 of this Power of Attorney are valuable and sufficient considerations and make all of the sections and parts of sections of this Power of Attorney binding obligations upon me and my agents and upon said lands and improvements, incomes, rents and profits thereof.

Section 10. Should any one or more of the sections herein or should any part of any section or sections herein from cause be declared void in or inoperative, this fact shall in [ny] way effect the legal force and effect of the other sections and parts of sections of this Power of Attorney.

Section 11. I hereby ratify and confirm all the acts of my agents named herein and I hereby revoke and cancel all other Powers of Attorney and agencies, and the parties named herein are my sole and only authorized and acting agents and attorneys in fact.

This Power of Attorney contains the full agreement between the parties hereto and shall not be changed or altered unless

the same is in writing and signed by all the parties, and no person has any authority to make any promise, representation or agreement which in any way changes or alters the terms and provisions of this Power of Attorney. In witness whereof we have hereunto set our hands and seals.

Dated this 20 day of May 1908.

Witnesses to mark and	ANDERSON WILSON,	(Seal)
Subscribing and attesting	her	
Witnesses.	LEUS X. WILSON,	(Seal)
Anderson Wilson,	Mark	
J. J. McClain.	ELI P. WILLIAMS,	(Seal)
	ELMER WILLIAMS,	(Seal)
	CHARLES H. WILLIAMS,	(Seal)

(Copy.)

15

Acknowledgment.

State of Oklahoma,
McCurtain County—ss.

Before me the undersigned a Justice of the Peace, in and for said County and State, on this the 20th, day of May 1908, personally appeared Anderson Wilson, and Leus Wilson, his wife, to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year above written.

J. J. McCLAIN,
Justice of the Peace McCurtain County.,
Township No. 4. Oklahoma.

16

Power of Attorney. Lane Wilson and wife to Eli P. Williams, et al.

Form G-2

Exhibit D

Choctaw Roll No....

Section 1. Know All Men By These Presents That I Lane Wilson and Bicy Wilson, his wife Post office address Boswell, Ok., represent that I am years old, in consideration of Dollars to me in hand paid, the receipt of same is hereby acknowledged and other valuable and sufficient considerations, I do by these presents appoint, constitute and nominate Eli P. Williams, Elmer Williams and Charles H. Williams, my sole and only true and lawful agents and attorneys in fact, hereafter called my agents, they to act either jointly or severally, [will] full, sole and absolute power

to do any and all acts, at any time that I could lawfully do myself—had I not executed this power of attorney—which in any way relate to all the lands and to any part of the land described hereinafter called said lands, and the possession, control, rents, income and profits thereof located in Oklahoma, to-wit:

The SW/4 of NW/4 and SW/4 of SE/4 and W/2 of SE/4 of SE/4 of Section 14, and the W/2 of SW/4 of SE/4 of Section 15, in Township 1, North, Range 6 West, Stephens County, State of Oklahoma:

My agents are hereby authorized to bring the law suits referred to in Section 8 of this Power of Attorney, at once, or at any date my agents may elect, and my agents are authorized to bring said law suits, should my agents so elect, in my name by Eli P. Williams, Elmer Williams and Charles H. Williams, Attorneys in fact.

Section 2. I hereby assign, transfer and deliver to my agents all of my right to the possession of said lands and improvements thereon and I agree within one year from this date to put my agents in actual and absolute possession thereof and my agents agree when put in possession as aforesaid, to advance to me on demand fifty dollars on this Power of Attorney and should I from any cause fail to furnish possession as above provided my agents are hereby authorized to acquire possession, of said lands and improvements at any time during the life of this Power of Attorney and to do any acts necessary in their opinion to be done to acquire said possession and when in possession agree to rent, manage and
17 look after said lands and improvements.

My agents have full, sole and absolute authority to collect and receive all moneys, rents and income of any kind now due or that hereafter become due from said lands, and my agents agree during my life to account to me and after my death to account to my heirs, executors and administrators for all moneys, rents and income received by them on account of my interest in said lands, less all expenses and less eight per cent on the amount actually received by them. Said eight per cent I allow my agents in full payment for their services for managing, renting or disposing of my interest in said lands. And I further agree not to assign or transfer all or any part of said moneys, rents and income.

Section 3. I hereby sell, convey, transfer and deliver to my agents an absolute interest in fee simple in all of the rents from said lands now due and that hereafter become due before the expiration of this Power of Attorney and in all of

the improvements on said lands and agree that this Power of Attorney is coupled with an interest in all of said rents and improvements.

Section 4. I hereby sell, convey and transfer to my agents an absolute interest in fee simple in all and in any part of said lands that I can lawfully sell or alienate.

Section 5. My agents are hereby given full, sole and absolute power, (at any date when I could lawfully sell—if this Power of Attorney had not been executed—all or any part of said lands whether that date is the present date or some future date) to sell in whole or in part on such terms and conditions as they may see fit for cash or on time all of my interest in said lands, and to convey and transfer same by deed in fee simple, in whole or in part and to receive the consideration of such sales and to do any other acts that in any way relate to said sales. Provided, that said sale or sales shall be advertised by my agents in some newspaper published in the Recording District or in the County, where said lands are located, for not less than four weeks, giving the date and terms of said sale and said lands are to be sold to the highest bidder.

18 Provided further that my agents have the right to reject all bids if in their opinion said lands have not sold for a fair price. Provided further, that said sale is subject to the approval or disapproval of the judge of the District Court where said lands are located and should said judge fail or refuse to pass upon said sale for sixty days after an application in writing has been presented to him requesting that he pass upon said sale, in that event, said sale shall become binding without the approval of said judge.

Section 6. This Power of Attorney shall continue in full force until the thirty-first day of December, nineteen hundred thirty-nine, and shall expire on said date and I agree that this Power of Attorney shall not be determined by my death but shall continue in full force and effect until the last mentioned date, and my agents have full, sole and absolute power in the event of my death to do any and all acts in their own name or names authorized to be done by this Power of Attorney, and I further agree for myself, my heirs, executors and administrators that this Power of Attorney shall not be revoked before the last mentioned date.

Section 7. Should any one or two of my agents die, this shall in no way effect the legal force and effect of this Power of Attorney, the survivor or survivors shall have the same full, sole and absolute power to act as if death had not occurred.

Section 8. My agents are authorized and have full, sole and absolute power to bring or defend, either in their own name or names or in my name, at their option, and dismiss any law suit that in any way relates to said lands, and improvements, possessions, income, rents and profits thereof and to prosecute said suits until finally adjudicated by the court of last resort.

19 Section 9. It is hereby stipulated and agreed that the consideration named in Section 1 and Section 2 of this Power of Attorney are valuable and sufficient considerations and make all of the sections and parts of sections of this Power of Attorney binding obligations upon me and my agents and upon said lands and improvements, incomes, rents and profits thereof.

Section 10. Should any one or more of the sections herein or should any part of any section or sections herein from cause be declared void or inoperative, this fact shall in no way affect the legal force and effect of the other sections and parts of sections of this Power of Attorney.

Section 11. I hereby ratify and confirm all the acts of my agents named herein and I hereby revoke and cancel all other Powers of Attorney and agencies, and the parties named herein are my sole and only authorized and acting agents and attorneys in fact.

This Power of Attorney contains the full agreement between the parties hereto and shall not be changed or altered unless the same is in writing and signed by all the parties, and no person has any authority to make any promise, representation or agreement which in any way changes or alters the terms and provisions of this Power of Attorney.

In witness whereof we have hereunto set our hands and seals.

Dated this 22 day of May 1908.

(Seal)

LANE WILSON,

her

(Seal)

BICY X WILSON,

Mark

(Seal)

ELI P. WILLIAMS,

(Seal)

ELMER WILLIAMS,

(Seal)

CHARLES H. WILLIAMS,

Witnesses to mark and Subscribing and attesting Witnesses.

John A. Armstrong,
Lane Wilson,

Copy.

Davis Jackson.

20

Acknowledgment.

State of Oklahoma,
Choctaw County—ss.

Before me a Notary Public in and for said County and State on the 22nd, day of May 1908, personally appeared Lane Wilson and Bicy Wilson, to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and date above written.

JOHN A. ARMSTRONG,
Notary Public.

My commission expires 18th of March 1911.

21 Power of Attorney, George Victor and wife to Eli P. Williams, et al.,

Form G-2.

Exhibit E.

Choctaw Roll No.

Section 1. Know All Men By These Presents That I George Victor and Nancy Victor, his wife Post office address Garvin, Ok., represent that I am years old, in consideration of One Dollars to me in hand paid, the receipt of same is hereby acknowledged and other valuable and sufficient considerations, I do by these presents appoint, constitute and nominate Eli P. Williams, Elmer Williams and Charles H. Williams, my sole and only true and lawful agents and attorneys in fact, hereafter called my agents, they to act either jointly or severally, [will] full sole and absolute power to do any and all acts, at any time that I could lawfully do myself—had I not executed this power of attorney—which in any way relate to all the lands and to any part of the land described hereinafter called said lands, and the possession, control, rents, income and profits thereof located in Oklahoma, to-wit:

The SW/4 of NW/4 and SW/4 of SE/4 and W/2 of SE/4 of SE/4 of Section 14, and W/2 of SW/4 of SE/4 of Section 15, and the SE/4 of SW/4 and E/2 of NE/4 of SW/4 and E/2 of SE/4 of NW/4 and SW/4 of NE/4 of NW/4 of Section 13, all in Township 1, North Range 6 West, Stephens County, State of Oklahoma.

My agents are hereby authorized to bring the law suits referred to in section 8 of this Power of Attorney, at once, or at any date my agents may elect, and my agents are authorized to bring said law suits should my agents so elect, in my name by Eli P. Williams, Elmer Williams and Charles H. Williams, Attorneys in fact.

Section 2. I hereby assign, transfer and deliver to my agents all of my right to the possession of said lands and improvements thereon and I agree within one year from this date to put my agents in actual and absolute possession thereof and my agents agree when put in possession as aforesaid, to advance to me on demand fifty dollars on this Power of Attorney and should I from any cause fail to furnish possession as above provided my agents are hereby authorized to acquire possession, of said lands and improvements at any time during the life of this Power of Attorney, and to do any acts necessary in their opinion to be done to acquire said possession, and when in possession agree to rent, manage and look after said lands and improvements.

22 My agents have full, sole and absolute authority to collect and receive all moneys, rents and income of any kind now due or that hereafter become due from said lands, and my agents agree during my life to account to me and after my death to account to my heirs, executors and administrators for all moneys, rents and income received by them on account of my interest in said lands, less all expenses and less eight per cent on the amount actually received by them. Said eight per cent I allow my agents in full payment for their services for managing, renting or disposing of my interest in said lands. And I further agree not to assign or transfer all or any part of said moneys, rents and income.

Section 3. I hereby sell, convey, transfer and deliver to my agents an absolute interest in fee simple in all of the rents from said lands now due and that hereafter become due before the expiration of this Power of Attorney and in all of the improvements on said lands and agree that this Power of Attorney is coupled with an interest in all of said rents and improvements.

Section 4. I hereby sell, convey and transfer to my agents an absolute interest in fee simple in all and in any part of said lands that I can lawfully sell or alienate.

Section 5. My agents are hereby given full, sole and absolute power (at any date when I could lawfully sell—if this

Power of Attorney had not been executed—all or any part of said lands whether that date is the present date or some future date) to sell in whole or in part on such terms and conditions as they may see fit for cash or on time all of my interest in said lands, and to convey and transfer same by deed in fee simple, in whole or in part and to receive the consideration of such sales and to do any other acts that in any way relate to said sales. Provided, that said sale or sales shall be advertised by my agents in some newspaper published in the Recording District or in the County, where said lands are located, for not less than four weeks, giving the date and terms of said sale and said lands are to be sold to the highest bidder.

23 Provided further that my agents have the right to reject all bids if in their opinion said lands have not sold for a fair price. Provided further, that said sale is subject to the approval or disapproval of the judge of the District Court where said lands are located and should said judge fail or refuse to pass upon said sale for sixty days after an application in writing has been presented to him requesting that he pass upon said sale, in that event, said sale shall become binding without the approval of said judge.

Section 6. This Power of Attorney shall continue in full force until the thirty-first day of December, nineteen hundred thirty-nine, and shall expire on said date and I agree that this Power of Attorney shall not be determined by my death but shall continue in full force and effect until the last mentioned date, and my agents have full, sole and absolute power in the event of my death to do any and all acts in their own name or names authorized to be done by his Power of Attorney, and I further agree for myself, my heirs, executors and administrators that this Power of Attorneys shall not be revoked before the last mentioned date.

Section 7. Should any one or two agents die, this shall in no way effect the legal force and effect of this Power of Attorney, the survivors or survivors shall have the same full, sole and absolute power to act as if death had not occurred.

Section 8. My agents are authorized and have full, sole and absolute power to bring or defend, either in their own name or names or in my name, at their option, and dismiss any law suit that in any way relates to said lands, and improvements, possessions, income, rents and profits thereof and to prosecute said suits until finally adjudicated by the court of last resort.

24 Section 9. It is hereby stipulated and agreed that the consideration named in Section 1 and Section 2 of this Power of Attorney are valuable and sufficient considerations and make all of the sections and parts of sections of this Power of Attorneys binding obligations upon me and my agents and upon said lands and improvements, incomes, rents and profits thereof.

Section 10. Should any one or more of the sections herein or should any part of any section or sections herein from cause be declared void or inoperative, this fact shall in no way effect the legal force and effect of the other sections and parts of sections of this Power of Attorney.

Section 11. I hereby ratify and confirm all the acts of my agents named herein and I hereby revoke and cancel all other Powers of Attorney and agencies, and the parties named herein are my sole and only authorized and acting agents and attorneys in fact.

This Power of Attorney contains the full agreement between the parties hereto and shall not be changed or altered unless the same is in writing and signed by all the parties, and no person has any authority to make any promise, representation or agreement which in any way changes or alters the terms and provisions of this Power of Attorney. In witness whereof we have hereunto set our hands and seals.

Dated this 20 day of May 1908.

Witnesses to mark and	GEORGE VICTOR,	(Seal)
Subscribing and attesting	NANCY VICTOR,	(Seal)
Witnesses.	ELI P. WILLIAMS,	(Seal)
.....	ELMER WILLIAMS,	(Seal)
.....	CHARLES H. WILLIAMS,	(Seal)

(Copy.)

25

Acknowledgment.

State of Oklahoma,
McCurtain County—ss.

Before me, the undersigned Justice of the Peace for said County and State, on this 20th day of May 1908, personally appeared George Victor and Nancy Victor his wife, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year above written.

J. J. McCLAIN,
Justice of the Peace, Township No. 4,
McCurtain County, Oklahoma.

26 Complaint, Filed in the Circuit Court on July 15, 1908.

28 Demurrer.

Now comes the defendants, Joe Anderson, Labitha Anderson, Jesse T. Kincannon and Sidney G. Kincannon, by their attorneys, and demur to the Complaint at Law filed in this cause, for the reason that said Complaint does not state facts sufficient to constitute a cause of action, or entitle the Plaintiffs to the relief prayed for.

And, further, that this Court has not jurisdiction over the subject matter in controversy, for the reason that said property is not of the value of \$2,000.00.

GILBERT AND BOND,
Attorneys for Defendants.

Humphrey & Robnett,
Of Counsel.

Filed in the Circuit Court on Sept. 9, 1908.

29 Confession of demurrer and order granting leave to file first amended complaint, etc. December 6, 1909.

Before Judge Campbell.

Comes plaintiff and confesses defendant's demurrer herein and is given leave to file First Amended Complaint instanter, which is accordingly filed, thereupon defendant is given 20 days to plead.

30 First Amended Complaint.

Comes now the Plaintiffs, and after leave of Court first being had and obtained, filed this their first amended complaint:

The Plaintiffs state:

That they are the owners in fee of the following described lands, to-wit:

The Southwest Quarter of the Northwest Quarter, and the Southwest Quarter of the Southeast Quarter, and the West Half of the Southeast Quarter of the Southeast Quarter of

Section Fourteen (14), and the West Half of the Southeast Quarter of the Southeast Quarter of Section Fifteen (15),
31 Township One (1) North, of Range Six (6) West, (Chickasaw Nation, of the Indian Base and Meridian, in Oklahoma, containing One Hundred and Twenty (120) acres, and

That the defendants are in the unlawful possession of said lands, claiming the same as their own, and refuse to surrender possession to plaintiffs or attorn to them for the rents and profits arising from said lands.

That plaintiffs derived title to the above described lands through one Mary Mitchel, a full blood Choctaw Indian, the allottee of said lands, and to whom the Chickasaw and Choctaw Nations executed an allotment patent, approved by the Secretary of the Interior of the United States, a certified copy of which said patent is attached to the original complaint in this case, and marked Exhibit "A", and which is hereby referred to and made a part of this first amended complaint. That said patent contained the following provisions:

"Subject, however, to the provisions of the act of Congress approved July 1, 1902, (32 Stat. 641)."

That on account of said clause in said patent, the entire act of Congress become a part of said patent, and a copy of sections 15, 16, 68 and 73 of said act read as follows:

"15. Lands allotted to members and Freedmen shall not be affected or encumbered by any deed, debt or obligation of any character contracted prior to the time at which said land may be alienated under this Act, nor shall said lands be sold except as herein provided."

"16. All lands allotted to the members of said tribes, except such lands as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each
32 case from date of patent; provided, that such land shall not be alienated by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value."

"68. No act of Congress or treaty provision, nor any provision of the Atoka Agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw Nations."

"73. This agreement shall be binding upon the United States and upon the Choctaw and Chickasaw Nations and all

Choctaws and Chickasaws, when ratified by Congress and by a majority of the whole number of votes cast by the legal voters of the Choctaw and Chickasaw tribes in the manner following: The principal chief of the Choctaw nation, and the governor of the Chickasaw Nation shall, within one hundred and twenty days after the ratification of this agreement by Congress, make public proclamation that the same shall be voted upon at any special election to be held for that purpose within thirty days thereafter, on a certain day therein named; and all male citizens of each of the said tribes qualified to vote under the tribal laws shall have a right to vote at the election precinct most convenient to his residence, whether the same be within the bounds of his tribe or not. And if this agreement be ratified by said tribes as aforesaid, the date upon which said election is held shall be deemed to be the date of final ratification."

That after receiving her allotment, the said Mary Mitchel died intestate, leaving the plaintiffs as her sole and only heirs at law, and who are the owners in fee of the above described lands, and who are now and have ever since the death of the said Mary Mitchell, been entitled to the possession of said lands.

33 That the above described lands are reasonably worth the sum of \$5,000.00, and of a reasonable annual rental value of the sum of \$250.00 per year, and that plaintiffs are entitled to recover that sum from the defendants as rent for said lands for each and every year since January 1st, 1906.

Plaintiffs allege that the defendants have no title in and to said lands, or any interest therein, and have invaded the rights of the plaintiffs, and have taken possession of said lands, and claim said lands as their own, and refuse to surrender the possession thereof, or attorn for the rents and profits arising therefrom, which is an impeachment and impairment of the title to said lands of the plaintiffs, derived from the United States, and the Choctaw and Chickasaw Nations, to the great property loss and damage of the plaintiffs.

That this action arises under, and its determination will necessarily involve and require a construction of the foregoing act of Congress.

For authority for plaintiffs to bring this suit they refer to copies of the powers of attorney of all of the plaintiffs in this suit, attached to the original complaint filed herein, marked Exhibits B, C, D, and E, and made a part of this first amended complaint.

Wherefore, the plaintiffs pray for judgment for the possession of said above described lands, as against the defendants, and all persons holding under, by or through said defendants, and for judgment for the rents and profits of said lands, in the sum of \$250.00 for each and every year since January 1st, 1906, and for costs of this suit, and for general and special relief.

N. B. MAXEY,
Attorneys for plaintiffs.

United States of America,
State of Oklahoma,
Eastern District—ss:

Eli P. Williams, one of the Plaintiffs in the above entitled cause, being first duly sworn on oath says: That he has read the foregoing first amended complaint; that he knows the contents thereof, and that the same are true in substance and in fact, as he verily believes.

ELI P. WILLIAMS,

Subscribed and sworn to before me this 3rd day of December 1909.

(Seal)

M. S. SHELOR,
Notary Public.

My Commission Expires Nov. 19, 1912.

Filed in the Circuit Court on December 6, 1909.

36 Demurrer to first amended Complaint.

Come now the defendants by their Attorney James E. Humphrey, by protestation not confessing or acknowledging any or all of the matters and things in said plaintiffs complaint to be true in such manner and form as therein set out and alleged, for cause say:

First: That said complaint does not state sufficient facts as to give this court jurisdiction of the parties or subject matter.

Second: That said complaint does not disclose such a state of facts as would entitle plaintiffs to recover in any event.

Wherefore, and for other divers good causes to demurrer appearing in said complaint, these defendants [demurrer]thereto and humbly demand the judgment of this court, whether

they shall be compelled to make answer to said complaint or any part thereof.

JAMES E. HUMPHREY,
Attorney for Defendants.

Filed in the Circuit Court on Dec. 15, 1909.

37 Order of February 21, 1910, sustaining Demurrer to first amended Complaint, etc.

Before Judge Campbell.

This cause coming on to be heard upon the demurrer to the Amended Complaint filed herein, and the Court after hearing the argument of counsel being fully advised in the premises, doth sustain said demurrer.

Plaintiff is given 10 days further in which to plead.

39 Second Amended Complaint.

Comes now the plaintiffs, and after leave of Court first being had and obtained, file this their second amended complaint:

The plaintiffs state:

That they are the owners in fee of the following described lands, to-wit:

The Southwest Quarter of the Northwest Quarter, and the Southwest Quarter of the Southeast Quarter, and the West Half of the Southeast Quarter of the Southeast Quarter of Section Fourteen (14), and the West Half of the Southwest Quarter of the Southeast Quarter of Section Fifteen (15), Township One (1) North, of Range Six (6) West, (Chickasaw Nation), of the Indian Base and Meridian, in Oklahoma, containing One Hundred and Twenty (120) acres, and

40 That the defendants are in the unlawful Possession of said land, claiming the same as their own, and refuse to surrender possession to plaintiffs or attorn to them for the rents and profits arising from said land.

That the matter in dispute in this suit exceeds exclusive of interest and costs the sum or value of Five Thousand Dollars (\$5000.00), and arising under the Constitution or laws of the United States or treaties.

That plaintiffs derived title to the above described land through one Mary Mitchell, a full blood Choctaw Indian, the allottee of said land, and to whom the Choctaw and Chick-

asaw Nations executed an allotment patent, approved by the Secretary of the Interior of the United States, a certified copy of said patent is attached to the original complaint in this case, and marked Exhibit "A", and which is hereby referred to and made a part of this Second amended Complaint. That said patent contained the following provision:

"Subject, however, to the provisions of the act of Congress approved July 1, 1902, (32 Stat. 641)."

That on account of said clause in said patent, the entire act of Congress become a part of said patent, and a copy of sections 15, 16, 68 and 73 of said act read as follows:

"15. Lands allotted to members and Freedman shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this Act, nor shall said lands be sold except as herein provided."

41 "16. All lands allotted to the members of said tribes, except such lands as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years in each case from date of patent; provided, that such land shall not be alienated by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value."

"68. No Act of Congress or treaty provision, nor any provision of the Atoka Agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw Nations."

"73. This agreement shall be binding upon the United States and upon the Choctaw and Chickasaw Nations and all Choctaws and Chickasaws, when ratified by Congress and by a majority of the whole number of votes cast by the legal voters of the Choctaw and Chickasaw tribes in the manner following: The principal chief of the Choctaw Nation, and the Governor of the Chickasaw Nation shall, within one hundred and twenty days after the ratification of this agreement by Congress, make public proclamation that the same shall be voted upon at any special election to be held for that purpose within thirty days thereafter, on a certain day therein named; and all male citizens of each of the said tribes qualified to vote at the election precinct most convenient to his residence, whether the same be within the bounds of his tribe or not. And if this agreement be ratified by said

tribes as aforesaid, the date upon which said election is held shall be deemed to be the date of final ratification."

42 That in open violation of the restrictions against the alienation of said land contained in the foregoing act of Congress and in the patent to said land Joe Anderson, one of the defendants in this action induced Simon Taylor, Melvin Taylor, Lues Wilson, Anderson Wilson, Lane Wilson, & Bicy Wilson, to execute and deliver to said Joe Anderson an illegal deed for said land and said illegal deed is dated July 31, 1905, and the consideration stated in said illegal deed is Seven hundred fifty dollars (\$750.00). That seven hundred fifty Dollars is the total price that Joe Anderson paid for said land which was a wholly inadequate price, that said land was in fact worth more than six times said price.

That all of said plaintiffs and grantors in the illegal deed to Joe Anderson are Indians by blood, and are wholly ignorant of land values and are in need of and entitled to the protection of said restrictions against the alienation of said land contained in said patent and in said act of Congress.

That the patent to Mary Mitchell to said land was approved by the Department of Interior September 20, 1905, and the illegal deed to Joe Anderson before mentioned is dated July 31, 1905, that on the date of said illegal deed to Joe Anderson, said land was not alienable under the act of Congress approved July 1, 1903, (32 Stat., 641).

That under said Act of Congress, said land was allotted and the title acquired thereto.

That the plaintiffs claim the title to said land and the right to the possession and rents thereof under the last mentioned acts of Congress.

43 That Joe Anderson and Sabitha Anderson, his wife has since attempted to convey said land to Jesse T. Kincaannon.

That the plaintiffs and the grantors in the before mentioned illegal deed to Joe Anderson had no power to convey said land on the date of said illegal deed and said illegal deed is repugnant to an act of Congress, approved, July, 1, 1902, (31 Stat., 641), and to an act of Congress approved April 26, 1906, and is an impeachment and impairment of the title to said land of the plaintiffs derived from the United States under said act of Congress to the great property loss and damage of the plaintiffs and is repugnant to the Constitution of the United States and is null and void.

That Mary Mitchell is a full blood Choctaw Indian, that Mary Mitchell died before July 31, 1905, leaving the plaintiffs as her sole and only heirs at law, and said heirs are full blood Choctaw Indians, and are the owners in fee of said land and who are now and have ever since the death of the said Mary Mitchell, been entitled to the possession of said land and said land are not now nor never has been alienable under the acts of Congress, approved July 31, 1902, (32 Stat., 641), and the Act of Congress, approved April 26, 1906, without the approval of the Secretary of the Interior, and the Secretary of the Interior has not approved the sale of said land.

44 That the primary question to be determined in this case involves a construction of the Acts of Congress above referred to, as it is the contention of the Plaintiffs that the deed executed by Plaintiffs to the Defendant, Joe Anderson, is void by reason of the Restriction on Alienation contained in said Acts of Congress, and if Plaintiffs' contention in this particular is not sustained, they must fail in this action; that it is the contention of the Defendants that, notwithstanding the restriction imposed by said Acts of Congress, that Plaintiffs had a right to convey at the time they executed said deed, and that the Defendant, Joe Anderson, took good title, and if Defendant's contention in this regard is sustained, the Plaintiffs fail in this action, so that this case cannot be decided without a construction, by the Court, of the Acts of Congress above referred to.

45 That the defendants unlawfully and by force took possession of said land and unlawfully and by force retains possession of said land and the defendants have no title or interest in or to said land or any right of possession, and are trespassers on said land and said possession of said defendants is repugnant to the act of Congress, approved July 31, 1902, (32 Stat., 641), and also to an act of Congress approved April 26, 1906, and the plaintiffs invoke the protection of said acts of Congress and of this Court.

That the above described land are reasonably worth an annual rental value of the sum of \$250.00 per year, and that plaintiffs are entitled to recover that sum from the defendants as rent for said land for each year since January 1st, 1906.

For authority of Plaintiffs to bring this suit they refer to copies of the powers of attorney of all of the plaintiffs in this suit, attached to the original complaint filed herein, marked Exhibit B. C. D. and E, and made a part of this Second Amended Complaint.

Wherefore, the plaintiffs pray for a judgment cancelling and annulling the illegal deed executed by Simon Taylor, Melvina

Taylor, Leus Wilson, Anderson Wilson, Lane Wilson and Betsy Wilson to Joe Anderson, and the deed from Joe Anderson and Sabitha Anderson to Jesse T. Kincannon and for a judgment annulling all the interest of the defendants in said land and the rents thereof and the improvements thereon, and a judgment for the possession of said above described land, as against the defendants, and all persons holding under, by or through said defendants, and for judgment for the rents and profits of said land, in the sum of \$250.00 for each and every
 46 year since January 1st, 1906, and for costs of this suit, and for general and special relief.

MAXEY, LEAHY & CAMPBELL,
 Attorneys for Plaintiffs.

United States of America,
 State of Oklahoma,
 Eastern District—ss.

Eli P. Williams, one of the plaintiffs in the above entitled cause, being first duly sworn on oath says: That he has read the foregoing second amended complaint; that he knows the contents thereof, and that the same are true in substance and in fact, as he verily believes.

ELI P. WILLIAMS.

Subscribed and sworn to before me this 26 day of February, 1910.

(Seal)

FRANK O. JOHNSON,
 Notary Public.

My Commission Expires May 20, 1910.

Filed in the Circuit Court on March 1, 1910.

48 Demurrer to Second Amended Complaint.

Come now the defendants by their Attorney James E. Humphrey, Esq., and present this their demurrer in the above entitled cause, and say that this court hath no jurisdiction of this case for the reason that no federal question is involved, and humbly pray the judgment of the Court as to whether the defendants herein be required further to plead.

JAMES E. HUMPHREY,
 Attorney for Defendants.

Filed in the Circuit Court on March 5, 1910.

50 Stipulation for submission of Demurrer to Second Amended Complaint.

It is hereby stipulated and agreed by and between the parties hereto [the] the demurrer of the defendants filed in

this cause and set for hearing at Tulsa on the 4th, day of April 1910, be submitted to the court without oral argument, on briefs to be filed. The defendants to file their brief within ten days and submit a copy thereof [the] the counsel for the plaintiffs, [the] the plaintiffs to file their brief within ten days thereafter and submit a copy [the] the counsel for the defendants.

Signed this 26th., day of March 1910.

MAXEY, LEAHY & CAMPBELL,
Attorneys for Plaintiffs.

JAMES E. HUMPHREY,
Attorney for Defendants.

Filed in the Circuit Court on March 29, 1910.

51 Submission of Demurrer to Second Amended Complaint, April 4, 1910.

Before Judge Campbell.

In accordance with Stipulation filed herein, it is ordered that the demurrer to the second amended complaint be submitted to the Court on briefs.

53 Memorandum Opinion.

Campbell, D. J.:

This is an action in the nature of an ejectment suit by the plaintiffs against the defendants for the recovery of the possession of the lands in controversy which it is alleged the defendants wrongfully withhold from them. There is no diversity of citizenship alleged. It is alleged that the matter in dispute exceeds, exclusive of interest and costs, the sum of \$5,000.00, and the plaintiffs contend that the facts alleged in the petition make it a suit arising under the constitution and laws of the United States, and therefore within the jurisdiction of this court. The defendants have demurred to the petition, denying that the suit as set forth in the petition is one arising under the constitution and laws of the United States, and contend that this court is therefore without jurisdiction to entertain the cause. That portion of the petition upon which plaintiffs rely as establishing their contention that the suit arises under the constitution or laws of the United States is as follows:

"That plaintiffs derived title to the above described land through one Mary Mitchell, a full blood Choctaw Indian, the

allottee of said land, and to whom the Choctaw and Chickasaw Nations executed an allotment patent, approved by the Secretary of the Interior of the United States, a certified copy of said patent is attached to the original complaint in this case, and marked Exhibit 'A', and which is hereby referred to and made a part of this Second amended Complaint.

54 That said patent contained the following provision:

'Subject, however, to the provisions of the act of Congress approved July 1, 1902, (32 Stat. 641).'

That on account of said clause in said patent, the entire act of Congress become a part of said patent, and a copy of sections 15, 16, 68 and 73 of said act read as follows:

'15. Lands allotted to members and Freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this Act, nor shall said lands be sold except as herein provided.'

'16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent; provided, that such land shall not be alienated by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal government for less than its appraised value.'

'68. No Act of Congress or treaty provision, nor any provision of the Atoka Agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw Nations.'

'73. This agreement shall be binding upon the United States and upon the Choctaw and Chickasaw Nations and all Choctaws and Chickasaws, when ratified by Congress and by a majority of the whole number of votes cast by the legal voters of the Choctaw and Chickasaw tribes in the manner following: The Principal chief of the Choctaw Nation, and the Governor of the Chickasaw Nations, shall within one hundred and twenty days after the ratification of this agreement by Congress, make public proclamation that the same shall be voted upon at any special election to be held for that purpose within thirty days thereafter, on a certain day therein named; and all male citizens of each of the said tribes qualified to vote under the tribal laws shall have a right to vote at the election precinct most convenient to his residence,

whether the same be within the bounds of his tribe or not. And if this agreement be ratified by said tribes as aforesaid, the date upon which said election is held shall be deemed to be the date of final ratification.'

That in open violation of the restrictions against the alienation of said land contained in the foregoing act of Congress and in the patent to said land Joe Anderson, one of the defendants in this action induced Simon Taylor, Melvin Taylor, Lues Wilson, Anderson Wilson, Lane Wilson, & Bicy Wilson, to execute and deliver to said Joe Anderson an illegal deed for said land and said illegal deed is dated July 31, 1905, and the consideration stated in said illegal deed is Seven hundred fifty dollars [(\$4750.00).] That seven hundred fifty dollars is the total price that Joe Anderson paid for said land which was a wholly inadequate price, that said land was in
55 fact worth more than six times said price.

That all of said plaintiffs and grantors in the illegal deed to Joe Anderson are Indians by blood, and are wholly ignorant of land values and are in need of and entitled to the protection of said restrictions against the alienation of said land contained in said patent and in said act of Congress.

That the patent to Mary Mitchell to said land was approved by the Department of Interior September 20, 1905, and the illegal deed to Joe Anderson before mentioned is dated July 31, 1905, that on the date of said illegal deed to Joe Anderson, said land was not alienable under the act of Congress approved July 1, 1903, (32 Stat., 641).

That under said act of Congress, said land was allotted and the title acquired thereto.

That the plaintiffs claim the title to said land and the right to the possession and rents thereof under the last mentioned acts of Congress.

That Joe Anderson and Sabitha Anderson, his wife has since attempted to convey said land to Jesse T. Kincannon.

That the plaintiffs and the grantors in the before mentioned illegal deed to Joe Anderson had no power to convey said land on the date of said illegal deed and said illegal deed is repugnant to an act of Congress, approved July 1, 1902, (31 Stat. 641), and to an act of Congress approved April 26, 1906, and is an impeachment and impairment of the title to said land of the plaintiffs derived from the United States under said act of Congress to the great property loss and damage of the plaintiffs and is repugnant to the Constitution of the United States and is null and void.

That Mary Mitchell is a full blood Choctaw Indian, that Mary Mitchell died before July 31, 1905, leaving the plaintiffs as her sole and only heirs at law, and said heirs are full blood Choctaw Indians, and are the owners in fee of said land and who are now have ever since the death of the said Mary Mitchell, been entitled to the possession of said land and said land are not now nor never has been alienable under the acts of Congress, approved July 31, 1902, (32 Stat. 641), and the Act of Congress, approved April 26, 1906, without the approval of the Secretary of the Interior, and the Secretary of the Interior has not approved the sale of said land.

That the primary question to be determined in this case involves a construction of the Acts of Congress above referred to, as it is the contention of the plaintiffs that the deed executed by plaintiffs to the defendant, Joe Anderson, is void by reason of the restriction on alienation contained in said Acts of Congress, and if plaintiff's contention in this particular is not sustained, they must fail in this action; that it is the contention of the defendants that, notwithstanding the restriction imposed by said Acts of Congress, that plaintiffs had a right to convey at the time they executed said deed, and that the defendant, Joe Anderson, took good title, and if defendant's contention in this regard is sustained, the
56 plaintiffs fail in this action, so that this case cannot be decided without a construction by the court of the Acts of Congress above referred to."

By section 6122 of Snyder's Compiled Laws of Oklahoma, it is provided:

"In an action for the recovery of real property, it shall be sufficient if a plaintiff state in his petition that he has the legal or equitable estate therein and is entitled to the possession thereof, describing the same as required by section 5667, and that the defendant unlawfully keeps him out of possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived."

Section 5667, referred to in the foregoing section, provides that the land shall be described with such convenient certainty as will enable an officer holding an execution to identify it. By section 6123 it is provided:

"That it shall be sufficient in such action if the defendant in his answer deny generally the title alleged in the petition, or that he withholds the possession, as the case may be. But if he deny the title of the plaintiff, possession by the defendant shall be taken as admitted."

It is seen therefore that while the plaintiff in an ejectment suit must recover upon the strength of his own title and not the weakness of his adversary's, it is not necessary for him to suggest in his petition how his estate or ownership is derived. The case of *Joy v. St. Louis*, 201 U. S. 322, was a suit in ejectment originally instituted in the Circuit Court of the United States for the Eastern District of Missouri. The plaintiff there, as in this case, set forth in detail that his title was derived through and by certain patents and acts of

57 Congress, and was originally vested in one Louis La Beaume, through whom, by a series of mesne conveyances, the plaintiff claimed title, and that a controversy had arisen between the plaintiff and the defendants as to the proper construction or legal effect of the said letters patent and acts of Congress, and that the claim of the plaintiff as to the proper construction and legal effect thereof was disputed by the defendants, and that the construction of said patents and acts of Congress constituted a controlling question in the case, upon the correct decision of which the plaintiff's title to the premises depended, and for that reason it was averred that the suit was one arising under the laws of the United States. In passing upon the question of jurisdiction, Judge Peckham, speaking for the court, says:

"There is no diversity of citizenship in this case, and the only ground of jurisdiction claimed is that the action arises under the laws of the United States. The case is a pure action of ejectment, and the general rule in such actions, as to the complaint, is that the only facts necessary to be stated therein are, that plaintiff is the owner of the premises described, and entitled to the possession, and that defendant wrongfully withholds such possession, to plaintiff's damage in an amount stated. Setting out the source of the plaintiff's title, as was done with so much detail in this case, was unnecessary, but it does not alter the case, because a claim that the title comes from the United States does not, for that reason merely, raise a Federal question. It is a long-settled rule, evidenced by many decisions of this court, that the plaintiff cannot make out a case as arising under the Constitution or the laws of the United States unless it necessarily appears by the complaint or petition or bill in stating plaintiff's cause of action. In *Gold-Washing Co. v. Keyes*, 96 U. S. 199, 203, it was said that before the Circuit Court can be required to retain a cause under its jurisdiction, under section 5, act of 1875, it must in some form appear upon the record, by a statement of facts, in legal and logical form, such as is required in

good pleading, that the suit is one which really and substantially involves a dispute or controversy, as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States. That

58 was a case of a petition for a removal of a suit from the state to the Federal court. But it has been held

that whether there is a right of removal in such cases depends upon whether the Circuit Court could have exercised original jurisdiction. *Third Street &c. Co. v. Lewis*, 173 U. S. 457; *Arkansas v. Coal Co.*, 183 U. S. 185; *Boston &c. Mining Co. v. Montana &c. Co.*, 188 U. S. 662,640. This original jurisdiction, it has been frequently held, must appear by the plaintiff's statement of his own claim, and it cannot be made to appear by the assertion in the plaintiff's pleading that the defense raises or will raise a Federal question. As has been stated, the rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of his cause of action, leaving to the defendant to set up in his answer what his defense is, and, if anything more than a denial of plaintiff's cause of action, imposing upon the defendant the burden of proving such defense. This principle was given effect to in *Tennessee v. Union & Planters' Bank*, 152 U. S. 454; *Must v. Arlington Hotel Co.*, 168 U. S. 430; *Third Street &c. Co. v. Lewis*, 173 U. S. 457; *Arkansas v. Coal Co.*, 183 U. S. *supra*; *Filhoil v. Maurice*, 185 U. S. 108; *Boston &c. Co. v. Montana &c. Co.*, 188 U. S. *supra*. The mere fact that the title of plaintiff comes from a patent or under an act of Congress does not show that a Federal question arises. It was said in *Blackburn v. Portland &c. Co.*, 175 U. S. 571, that "this court has frequently been vainly asked to hold that controversies in respect to lands, one of the parties to which had derived his title directly under an act of Congress, for that reason alone presented a Federal question." The same principle was held in *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, and also in *De Lamar's Gold Mining Co. v. Nesbitt*, 177 U. S. 523.

To say that there is a dispute between the parties as to the construction of the patent or of the several acts of Congress referred to, does not raise a Federal question, because a statement that there is such dispute is entirely unnecessary in averring or proving plaintiff's cause of action. His source of title, as set forth in the petition, might not be disputed, and the defense might rest upon the defense of adverse possession, as set up in the answer. If defendants contented themselves on the trial with proof of such defense, then no question of a Federal nature would have been tried or decided."

In the case at bar, as in the Joy case, *supra*, under the statutes of Oklahoma above-referred to this being an action of ejectment, the only facts necessary to be stated in the petition are that the plaintiff is the owner of the premises described and entitled to the possession, and that the defendant

wrongfully withholds such possession, to plaintiff's
59 damage in the amount stated. Setting out the acts of

Congress under which the land was allotted to the original allottee was unnecessary. The allegations which the plaintiffs contend show that the case arises under the laws of the United States and involves their construction, are not necessary allegations in the petition, and in the Joy case, *supra*, Judge Peckham says that it is a long settled rule, evidenced by many decisions of that court that the plaintiff cannot make out a case as arising under the Constitution or laws of the United States unless it necessarily appears by the complaint or petition or bill in stating plaintiff's cause of action, and that it must in some form appear upon the record, by a statement of facts in legal and logical form such as is required in good pleading, that the suit is one which really and substantially involves a dispute or controversy as to a right which depends upon the construction or effect of the Constitution or some law of treaty of the United States.

If in the case at bar the answer of the defendants should set up the defense anticipated by the plaintiffs—that is, should rely upon the deed of July 31, 1905, and should contend that under a proper construction of the acts of Congress referred to, the plaintiff could and did legally convey the premises in controversy by such deed—then there would arise a question as to the proper construction of such acts of Congress, and a Federal question would then be involved. But the defendants may not rely upon such defense. They may rely upon a deed of later date from the plaintiffs [—] taken at such time and under such circumstances as would render it

valid. They may deny that plaintiff's ancestor was in
60 fact the allottee of the land, and may rely upon a deed from some other source. There are various defenses which they might set up other than that anticipated by the plaintiff's in their petition, which would not involve the construction of the acts of Congress referred to, but raise only questions under the state laws or questions of fact. But the question raised by the demurrer must be determined from a consideration of the necessary and proper allegations of the petition, shown of all unnecessary parts, and so considered it cannot be said to present a case arising under the Constitution or laws of the United States, hence does not state a case within the jurisdiction of this court. Should the plain-

tiffs hereafter commence this action in the proper state court, and the defendants there set up in their answer the defense which the plaintiffs anticipate, then a Federal question will be presented which the state court in the first instance has jurisdiction to determine. If the decision of the trial court on this Federal question be adverse to the plaintiffs, they may appeal to the Supreme Court of the state; if the decision of that court on the question be again adverse to the plaintiffs, they may appeal to the Supreme Court of the United States, and thus finally have the question decided by a Federal court.

The following cases are relied upon by plaintiffs for authority for the jurisdiction contended for.

Doolan v. Carr, 125 U. S. 618.

In this case the plaintiff claimed under a patent from the United States. The court say :

"No citizenship of either party is alleged and this is urged as a ground of reversal in this court to which the case has been brought upon a writ of error. It, however, appears very clearly that the controversy turns upon the validity of
61 the patent from the United States under which plaintiff claims title and which was denied by the defendants. The Circuit Court for the District of California therefore had jurisdiction of the case as one arising under the Constitution and laws of the United States within the meaning of the act of March 3rd, 1875, 18 Stat. 470."

It does not appear that the question of the jurisdiction of the trial court was raised at the threshold of the case by demurrer, as in the case at bar, but the defendant answered denying the validity of the patent and the court holds that where the controversy turns upon the validity of the patent from the United States, the Circuit Court of the United States has jurisdiction. Evidently this controversy did not appear until the answer of the defendant was interposed. Had the defendant demurred to the jurisdiction, under the doctrine announced in the *Joy* case, *supra*, the demurrer should have been sustained, but having apparently consented to the jurisdiction and by his answer having attacked the validity of the patent, thus making a controversy within the jurisdiction of the court he could not successfully attack the jurisdiction for the first time on appeal.

Cook V. Avery, 147 U. S. 390.

Of this case Judge Peckham says, in *Joy* case:

"In *Cook v. Avery*, 147 U. S. 375, this question was not decided., It was not referred to in the course of the opinion,

and it is no authority for plaintiff's contention herein. It was simply held that there was an issue between the parties which depended upon the laws of the United States and the rules of the Circuit Court and their construction and application were directly involved."

In *Cook v. Avery*, supra, referring to the defendant's contention that the court was without jurisdiction, because a Federal question was not involved, Mr. Chief Justice Fuller, speaking for the court said:

62 "On the former trial of this case, defendant contended that under a proper construction of section 916 and the rules of the Circuit Court, the laws of Texas in force in 1873 governed the judgment lien under which plaintiff claimed title, and that by those laws the lien was lost because execution had not been issued each year prior to the issue of that on which the land was sold; while plaintiff contended that the statutes of Texas enacted in 1879 governed the lien and under them the lien was not lost by failure to issue the execution each year. It is now insisted by defendants that the latter is the true view and hence it is said that there is no real and substantial controversy arising under the laws of the United States. Clearly the right of a plaintiff to sue cannot depend upon the defense which a defendant may choose to set up, and as on the first trial defendants relied on the decision of a Federal question to defeat the action, such a concession of the existence of a Federal ingredient in the cause might fairly be held to bind them when they subsequently abandon it and seek to oust the jurisdiction upon the ground that there could be no real dispute as to the applicable law."

From the foregoing quotation, it is evident why Justice Peckham, in the *Joy* case, held that the case of *Cook v. Avery* did not support the plaintiff's contention in *Joy v. St. Louis*.

Spokane Falls &c. R. Co. v. Zeigler, 167 U. S. 65.

In this case Zeigler as plaintiff brought suit against the railway company in the Superior Court for Spokane County, Washington, for land taken and damages incurred by reason of the construction of a railroad across his claim. The suit was by the railroad company removed to the United States Circuit Court. It was there tried, resulting in a judgment for the plaintiff. The railroad company appealed to the Circuit Court of Appeals where the judgment was affirmed. It then appealed to the Supreme Court, it urged that the judgment should be reversed because the plaintiff's petition in the state Court did not disclose either that the parties were

63 citizens of different states or a cause of action involving a right claimed under the Constitution or laws of the United States. In regard to this contention, the court say:

"Whether it would be competent for the plaintiff in error, in the circumstances stated, to challenge the jurisdiction of the Circuit Court at this stage of the controversy we need not consider, because we think that the plaintiff's statement did disclose a cause of action arising under the laws of the United States and cognizable by the Circuit Court.

In his complaint the plaintiff alleged that, on May 1, 1889, he was in possession, as a preemptor under the laws of the United States, of a tract of land containing about eighty acres, and on said date had made all the improvements and had lived on the land a sufficient length of time, and had done all other acts necessary to entitle him to a patent to the same from the United States; that the defendant company, being a corporation of the Territory of Washington, on said date entered upon and seized a strip of said land fifty feet in width, and appropriated it for railroad purposes without the consent of the plaintiff, and without having compensated him therefor; and that the entry upon and seizure by the defendant of the land was under and pursuant to the laws of the Territory of Washington authorizing railroad companies to appropriate land for right of way for railroad tracks.

We have judicial knowledge that the authority of the Territory to legislate, in respect to the right of a territorial railroad corporation to enter upon the public lands of the United States, was derived from the act of Congress entitled, "An act granting to railroads the right of way through the public domain lands of the United States", approved March 3, 1875, Stat., 482, whereby the right of way through the public lands of the United States was granted to any railroad company duly organized under the laws of any State or Territory.

The plaintiff's complaint, therefore, discloses the case of a contest between a settler claiming title under the laws of the United States and a railroad company claiming a right under an act of Congress; and of such a case the Circuit Court for the District of Washington clearly had jurisdiction. *Doolan v. Carr*, 125 U. S. 618; 620; *Cooke v. Avery*, 147 U. S. 375."

From the necessary statement in the plaintiff's petition of the steps taken by him as preemptor of the public lands under the laws of the United States and the necessary allegation that the defendant was a Territorial corporation, the court, as they say, judicially knew that the authority of the

Territory of Washington to confer the power on the railroad company to enter upon the land, was derived originally
64 from an Act of Congress and that the plaintiff's complaint disclosed a controversy of which the court had jurisdiction. None of the necessary allegations in the plaintiff's petition, in the case at bar, disclose any such controversy.

Northern-Pacific Railway Co.

v.

Soderberg, 188 U. S. 526.

This was a bill in equity filed by the railroad company against Soderberg in the Circuit Court of the United States for the District of Washington, praying an injunction restraining him from quarrying stone from a granite ledge from land which the railroad company claimed under the terms of an Act of Congress under which its grantor acquired the right of way and certain alternate sections along its line of lands "not mineral". As a part of its bill for injunction, it alleged that the defendant had entered upon the land in controversy and begun to quarry and dispose of the granite under a mineral location made by him, claiming that such land was excepted from the general land grant under which plaintiff claimed, and the bill alleged that the question in the case was whether the land in question was "mineral land" in the sense in which that term was used in the act of Congress referred to, and that that question had not yet been determined by the Department. The defendant answered raising no issue of fact, but averred that the land was mineral land and excepted from the railroad grant by the terms of the act of Congress. The trial court sustained the contention of the defendant and entered a decree dismissing the bill. The case was appealed to the Circuit Court of Appeals, where the decree was affirmed. The railroad company then ap-
65 pealed the case to the Supreme Court, where the defendant moved to dismiss the appeal for the reason that the jurisdiction of the Federal court was invoked upon the ground of diverse citizenship, and that therefore the decree of the Court of Appeals was final, under the provisions of the Court of Appeals Act of 1891. Regarding this contention, the court say:

"But to impress the attribute of finality upon a judgment of the Circuit Court of Appeals, it must appear that the original jurisdiction of the Circuit Court was dependent 'entirely' upon diverse citizenship. That is not the case here. Plaintiff's bill does indeed set up a diversity of citizenship as one ground of jurisdiction, but as it appears that its title rests upon a proper interpretation of the land grant act of 1864 as

to the exception of non-mineral lands, there is another ground wholly independent of citizenship under that clause of section 1 of the act of 1888, 25 Stat. 433, clothing the Circuit Court with jurisdiction of all civil suits involving over \$2000, 'and arising under the Constitution or laws of the United States.' If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States. *Doolan v. Carr*, 125 U. S. 618; *Cooke v. Avery*, 147 U. S. 375. Under the allegations of the bill the fact that the Land Department had not determined whether the land in question was mineral or non-mineral, does not involve a question of fact, as the facts are admitted, but solely a question of law whether land valuable for its granite is mineral or non-mineral under the terms of the grant. *Morton v. Nebraska*, 21 Wall. 660. The fact that a patent issued pending suit is neither set up in the pleadings nor noticed in the opinion of either court. The motion to dismiss must therefore be denied."

The above suit, it is seen, was by bill in equity for injunction. The allegations of the bill as to the plaintiff's title from the government disclosed a question of law depending, as the court says, upon whether land valuable for its granite is mineral or non-mineral under the terms of the grant, so that the plaintiff's statement of its own claim disclosed the fact that a construction of the act of Congress was necessary in order to determine whether the plaintiff ever acquired title to the land in controversy. In the case at bar, the petition raises no question as to the title having originally passed to plaintiffs by virtue of the allotment of the land to their ancestor, but the Federal question depends upon whether the defendants shall rely upon the deed of July 31, 1905. If they do, then, as we have seen, the construction of the act of Congress may become necessary. If they do not, and make some other defense, then it may or may not be of such character as to require the construction of the Constitution or an Act of Congress.

Southern Kansas Railway Co. v. Briscoe, 144 U. S. 133.

In this case the jurisdiction depended entirely upon the terms of a special act of Congress under which the railway company was authorized to construct its line through the Indian Territory, and cannot be said to throw any light upon the general jurisdictional question now being considered.

Smith v. Stevens, 77 U. S. 321.

This was a suit in ejectment commenced in a Kansas state court, afterwards appealed to the Supreme Court of the State and from there to the Supreme Court of the United States. During the progress of the case in the State court, the effect of certain acts of Congress and treaties relating to Indian lands came in question, and from the decision of the
67 State Supreme Court an appeal was taken to the United States Supreme court. The question of jurisdiction, as it arises here, was not in any way in that case. The case of *Pickering v. Lomax*, 145 U. S. 310, which is also relied upon, originated in an Illinois state court, and was appealed to the Supreme Court of that State, thence to the Supreme Court of the United States, and sheds no light upon the question here. Nor do I find anything in *Barry v. Edmonds*, 116 U. S. 550, or *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571, cited by plaintiffs, that sustains their contention on this jurisdictional question.

To my mind the case of *Joy v. St. Louis*, *supra*, is decisive of this case, and the demurrer therefore will be sustained, and the cause dismissed for lack of jurisdiction.

It is so Ordered.

RALPH E. CAMPBELL, Judge.

Filed in the Circuit Court on March 4, 1911.

68

Decree, March 4, 1911.

Now on this 4th day of March 1911, at a regular term of this court, this cause came on for hearing upon the demurrer of the defendants herein to the jurisdiction of this court to hear and determine said action; the plaintiffs Simon Taylor, Melvin Taylor, Lues Wilson, Anderson Wilson, Lane Wilson Bicey Wilson and George Victor, appearing by their attorneys Maxey, Campbell & Beall and the defendants Joe Anderson, Labitha Anderson, Jesse T. Kincannon and Sidney Kincannon, appearing by their attorney James E. Humphrey,

Thereupon said cause was submitted to the court upon oral argument and briefs filed by the parties hereto, and the court being fully advised, is of opinion that said demurrer is well taken and that said cause should be dismissed for want of the jurisdiction of the court to hear and determine the same.

It is Therefore Considered, Adjudged and Decreed by the court, that said demurrer be and the same is hereby sustained

and this cause Dismissed for want of jurisdiction, to which decree, the plaintiffs then and there in open court excepted.

RALPH E. CAMPBELL,
Judge.

70

Assignment of Errors.

Comes now the Plaintiffs in Error above named and say that in the foregoing record and proceedings there is manifest error in the action, ruling, opinion and judgment of the United States Circuit Court for the Eastern District of Oklahoma, in this, to-wit:

71

First.

The Court erred in sustaining the demurrer of the Defendants in Error to the second amended complaint of the Plaintiffs in Error.

Second.

The Court erred in not overruling the demurrer of the Defendants in Error to the second amended complaint of the Plaintiffs in Error.

Third.

The Court erred in dismissing the second amended complaint of Plaintiffs in Error, and rendering judgment against them for costs.

Wherefore, and for divers other errors apparent on the face of the record, the Plaintiffs in Error pray that said proceedings, as well as the judgment of the United States Circuit Court for the Eastern District of Oklahoma, be reversed, set aside and held for naught.

N. B. MAXEY,
Attorney for Plaintiffs in Error.

Filed in the Circuit Court on July 14, 1911.

72

Petition for Writ of Error.

Your petitioners, Simon Taylor, Melvin Taylor, Lues Wilson, Anderson Wilson, Lane Wilson, Bicy Wilson, George Victor, Nancy Victor, by Eli P. Williams, Elmer Williams, and Charles H. Williams, Attorney in fact for all of the above named parties Plaintiffs in Error in the above styled cause, respectfully show that the above entitled cause is now pending in the United States Circuit Court for the Eastern District

of Oklahoma, and that judgment has been rendered
72½ therein against the Plaintiffs in Error, and your petitioners feeling themselves aggrieved at the rendition of said judgment and this being a proper case to be reviewed by the United States Circuit Court of Appeals for the Eighth Circuit, upon a writ of error;

That in said judgment and decree of the United States Circuit Court for the Eastern District of Oklahoma certain errors were committed, to the prejudice of the Plaintiffs in Error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, the Plaintiffs in Error pray that a writ of error may be issued in this behalf out of the United States Circuit Court of Appeals for the Eighth Circuit for the correction of the errors so complained of, and that the transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, at St. Louis, Missouri.

M. B. MAXEY,
Attorney for Plaintiffs in Error.

Allowed By:

Ralph E. Campbell,
Judge of the United States Circuit Court
for the Eastern District of Oklahoma.

Filed in the Circuit Court on July 14, 1911.

73

Bond on Writ of Error.

Know All Men By These Presents: That we, Simon Taylor, Melvin Taylor, Lues Wilson, Anderson Wilson, Lane Wilson, Bicy Wilson, George Victor, Nancy Victor, by Eli P. Williams, Elmer Williams, and Charles H. Williams, Attorney in fact for all of above parties, all of the State
74 of Oklahoma, and W. A. Lamon and I. N. Ury, are held and firmly bound unto Joe Anderson, Labitha Anderson, Jesse T. Kincannon and Sidney G. Kincannon, in the full and just sum of Five Hundred (\$500.00) Dollars, to be paid to the said Defendants in Error, their successors, administrators and assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13 day of July, 1911.

Whereas, lately at a regular term of the United States Circuit Court for the Eastern District of the State of Oklahoma,

in a suit pending in said Court, wherein the Plaintiffs in error above named were Plaintiffs, and the Defendants in Error above named were Defendants, judgment was rendered against the said Plaintiffs in Error and in favor of the said Defendants in Error, and the said Plaintiffs in Error have obtained a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, to reverse the judgment in the aforesaid suit, and citation directed to the Defendants in Error, said suit, and citation directed to the Defendants in Error, citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit in the City of St. Louis, Missouri, sixty (60) days from and after said citation.

Now, the condition of the above obligation is such that if the said Plaintiffs in Error shall prosecute said error to effect, and answer all costs if they fail to make good their plea, then this obligation to be void, else to remain in full force and virtue.

75

SIMON TAYLOR,
MELVIN TAYLOR,
LUES WILSON,
ANDERSON WILSON,
LANE WILSON,
BICY WILSON,
GEORGE VICTOR,
NANCY VICTOR,

By Eli P. Williams, Elmer Williams, and
Charles H. Williams, Attorney in fact for all
of above named parties.

By N. B. Maxey,
Their Attorney.

W. A. LAMON,
I. N. URY.

Approved:

RALPH E. CAMPBELL,
Judge of the United States Circuit Court for the
Eastern District of Oklahoma.

Filed in the Circuit Court on July 14, 1911.

76

Writ of Error.

United States of America—ss:

The President of the United States to the Honorable Ralph E. Campbell, Judge of the Circuit Court of the United States for the Eastern District of the State of Oklahoma, Sitting at Muskogee—Greeting:

77 Because in the record and proceedings, as also in the rendition of the judgment of a plea, which in said United States Circuit Court before you at the January Term thereof, between Simon Taylor, Melvin Taylor, Lues Wilson, Anderson Wilson, Lane Wilson, Bicy Wilson, George Victor, Nancy Victor, by Eli P. Williams, Elmer Williams, and Charles H. Williams, Attorney in fact for all of above named parties, Plaintiffs in Error, and Joe Anderson, Labitha Anderson, Jesse T. Kincannon and Sidney G. Kincannon, Defendants in Error, a manifest error hath happened, to the great damage of the said Plaintiffs in Error, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, at St. Louis, Missouri, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the 13th day of September, 1911, to the end that the record and proceedings aforesaid, being inspected, the United States Circuit Court of Appeals for the Eighth Circuit may cause further to be done therein to correct that error what of right and according to the law and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 14 day
78 of July, 1911.

Seal
U. S. Circuit Court,
East. Dist. Okla.

Issued at office in the City of Muskogee, Oklahoma, with the seal of the United States Circuit Court for the Eastern District of the State Oklahoma hereto affixed the day last above written.

L. G. DISNEY,
Clerk of the Circuit Court of
the United States for the
Eastern District of Oklahoma.
By H. E. Boudinot,
Deputy.

Allowed By:

RALPH E. CAMPBELL,
 Judge of the United States
 Circuit Court for the Eastern
 District of the State of
 Oklahoma.

Return to Writ.

United States of America,
Division of the Eastern,
 Judicial District of Oklahoma—ss.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Circuit Court, at office in the City of Muskogee, this 17th day of August, A. D. 1911.

Seal
 U. S. Circuit Court,
 East. Dist. Okla.

L. G. DISNEY,
 Clerk of said Court.
 By **H. E. Boudinot,**
 Deputy.

79

Citation.

United States of America—ss.

To Joe Anderson, Labitha Anderson, Jesse T. Kincannon and Sidney G. Kincannon and James E. Humphrey, Their Attorney of Record,—Greeting:

80 You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Eighth Circuit, at St. Louis, Missouri, within sixty (60) days from this date, pursuant to a writ of error filed in the Clerk's office of the United States Circuit Court for the Eastern District of Oklahoma, wherein Simon Taylor, Melvin Taylor, Lues Wilson, Anderson Wilson, Lane Wilson, Bicy Wilson, George Victor, Nancy Victor, by Eli P. Williams, Elmer Williams, and Charles H. Williams, Attorney in fact for all of above named parties, are Plaintiffs in Error, and Joe Anderson, Labitah Anderson, Jesse T. Kincannon and Sidney G. Kincannon are Defendants in Error, to show cause, if any there be, why the Judgment in said writ of error mentioned

should not be corrected and speedy justice should not be done to the parties on their behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 14 day of July, 1911.

RALPH E. CAMPBELL,
Judge of the United States
Circuit Court for the Eastern
District of Oklahoma.

I hereby acknowledge service and acceptance of the above and foregoing citation on this 17th day of July, 1911.

JAMES E. HUMPHREY,
Attorney for Defendants in
Error, Joe Anderson, Labitha
Anderson, Jesse T. Kincannon
and Sidney G. Kincannon.

81

Clerk's Certificate to Transcript.

United States of America,
Eastern District of Oklahoma—ss.

I, L. G. Disney, Clerk of the United States Circuit Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the Case of Simon Taylor, et al vs. Joe Anderson, as was ordered to be prepared and authenticated, together with the original Writ of Error and Citation, as the same appears from the record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Muskogee, this 18th day of August, A. D. 1911.

Seal
U. S. Circuit Court,
East. Dist. Okla.

L. G. DISNEY,
Clerk.
By H. E. Boudinot,
Deputy

Filed Aug. 23, 1911. John D. Jordan, Clerk.

And thereafterwards, to-wit, on the 16th day of March, 1912, the Mandate from the United States Circuit Court of Appeals was received and filed by the Clerk of the United States District Court for the Eastern District of Oklahoma, as successor of the United States Circuit Clerk of said District and by order of the Court was spread upon the record of this Court.

Said Mandate is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the
[SEAL.] Eastern District of Oklahoma, as the Successor of the Circuit Court for said District, Greeting:

Whereas, lately in the Circuit Court of the United States for the Eastern District of Oklahoma, before you, or some of you, in a cause between Simon Taylor, Melvina Taylor, Lues Wilson, Anderson Wilson, Lane Wilson, Bicy Wilson, George Victor, Nancy Victor, by Eli P. Williams, Elmer Williams, and Charles H. Williams, Attorneys in fact for all of above named parties, Plaintiffs, and Joe Anderson, Labitha Anderson, Jesse T. Kincannon, and Sidney G. Kincannon, defendants, wherein the judgment of the said Circuit Court in said cause, entered on the 4th day of March, A. D. 1911, was in favor of the defendants and against the said plaintiffs,—as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals, Eighth Circuit, by virtue of a writ of error agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of December, in the year of our Lord one thousand nine hundred and eleven, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the transcript of the record from the said Circuit Court, and upon the motion of defendants in error to dismiss the writ of error herein.

On consideration whereof, it is now here ordered and adjudged by this Court, that the writ of error to the said Circuit Court, in this cause, be, and the same is hereby, dismissed with costs for want of jurisdiction; and that Joe Anderson, Labitha Anderson, Jesse T. Kincannon and Sidney G. Kincannon have and recover against Simon Taylor, Melvin Taylor, Lues Wilson, Anderson Wilson, Lane Wilson, Bicy Wilson, George Victor, Nancy Victor, by Eli P. Williams, Elmer Williams and Charles H. Williams, Attorneys in fact for all of above named parties, the sum of twenty dollars for their costs herein and have execution therefor, January 11, 1912.

You, therefore, are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness, the Honorable Edward D. White, Chief Justice of the

Supreme Court of the United States, the Fifteenth day of March, in the year of our Lord one thousand nine hundred and twelve.

JOHN D. JORDAN,
*Clerk of the United States Circuit
Court of Appeals, Eighth Circuit.*

Costs of Defendants in Error—

Clerk	\$	Paid by
Printing Record.....	\$	Plaintiffs
Attorney.....	\$	in Error.

\$

#501. United States Circuit Court of Appeals. No. 3656. December Term, 1911. Simon Taylor, et al., Plaintiffs in Error, vs. Joe Anderson et al. Filed Mar. 16, 1912. R. P. Harrison, Clerk U. S. District Court. Mandate.

And thereafterwards, to-wit, on the 16th day of July, 1912, the Plaintiffs filed their Petition for Writ of Error and Assignment of Errors, which Petition for Writ of Error was allowed by the Court. Said Petition for Writ of Error, Order allowing same and Assignment of Errors are in words and figures as follows, to-wit:

In the Supreme Court of the United States.

No. —.

SIMON TAYLOR, MELVINA TAYLOR, LEUS WILSON, ANDERSON WILSON, Lane Wilson, Bicy Wilson, George Victor, Nancy Victor, by Eli P. Williams, Elmer Williams, and Charles H. Williams, Attorneys in Fact for all of Above Named Parties, Plaintiffs in Error,

vs.

JOE ANDERSON, LABITHA ANDERSON, JESSE T. KINCANNON, and SIDNEY G. KINCANNON, Defendants in Error.

Petition for Writ of Error.

Your petitioners, Simon Taylor, Melvina Taylor, Leus Wilson, Anderson Wilson, Lane Wilson, Bicy Wilson, George Victor, Nancy Victor, by Eli P. Williams, Elmer Williams and Charles H. Williams, attorneys in fact for all of the above named parties, Plaintiffs in Error in the above styled cause, respectfully show that the above entitled cause is now pending in the United States Circuit Court for the Eastern District of Oklahoma, and that judgment has been rendered therein against the Plaintiffs in Error; and your petitioners, feeling themselves aggrieved at the rendition of said judgment, and this being a proper case to be reviewed by the United States Supreme Court, upon a writ of error;

That in said judgment and decree of the United States Circuit Court for the Eastern District of Oklahoma, certain errors were committed, to the prejudice of the Plaintiffs in Error, all of which will more in detail appear from the Assignment of Errors which is filed with this petition.

Wherefore, the Plaintiffs in Error pray that a writ of error may be issued in this behalf out of the United States Supreme Court, for the correction of the errors so complained of, and that the transcript of the record, proceedings, and papers, in this cause, duly authenticated, may be sent to the United States Supreme Court, at the City of Washington, D. C.

N. B. MAXEY,
Attorney for Plaintiffs in Error.

Allowed by

RALPH E. CAMPBELL,
*Judge of the United States District
Court for the Eastern District of Oklahoma.*

Endorsed: Filed July 16, 1912. R. P. Harrison, Clerk.

In the Supreme Court of the United States.

No. —.

SIMON TAYLOR, MELVINA TAYLOR, LEUS WILSON, ANDERSON WILSON, Lane Wilson, Bicy Wilson, George Victor, Nancy Victor, by Eli P. Williams, Elmer Williams, and Charles H. Williams, Attorneys in Fact for all of Above Named Parties, Plaintiffs in Error,

VS.

* JOE ANDERSON, LABITHA ANDERSON, JESSE T. KINCANNON, and SIDNEY G. KINCANNON, Defendants in Error.

Assignment of Errors.

Comes now the Plaintiffs in Error, in order above named, and say:

That in the foregoing decree and proceedings there is manifest error in the action, ruling, opinion, and judgment of the United States Circuit Court for the Eastern District of Oklahoma, in this, to-wit:

I.

The Court erred in sustaining the demurrer of the Defendants in Error to the second amended complaint of the Plaintiffs in Error, and dismissing its suit for want of jurisdiction of the Court to hear and determine the same.

II.

The Court erred in not overruling the demurrer of the Defendants in Error to the second amended complaint of the Plaintiffs in Error, and erred in not taking jurisdiction of said cause, and trying the same on its merits.

III.

The Court erred in dismissing the second amended complaint of Plaintiffs in Error, for want of jurisdiction, and rendering judgment against them for costs.

Wherefore, the Plaintiffs in Error pray that said proceeding, as well as the judgment of the United States Circuit Court for the Eastern District of Oklahoma, be reversed, set aside and held for naught.

N. B. MAXEY.

Attorney for Plaintiffs in Error.

Endorsed: Filed July 16, 1912. R. P. Harrison, Clerk.

In the Supreme Court of the United States.

No. —.

SIMON TAYLOR, MELVINA TAYLOR, LEUS WILSON, ANDERSON WILSON, Lane Wilson, Bicy Wilson, George Victor, Nancy Victor, by Eli P. Williams, Elmer Williams, and Charles H. Williams, Attorneys in Fact for all of Above Named Parties, Plaintiffs in Error,

vs.

JOE ANDERSON, LABITHA ANDERSON, JESSE T. KINCANNON, and SIDNEY G. KINCANNON, Defendants in Error.

Bond on Writ of Error.

Know all men by these presents: That we, Simon Taylor, Melvina Taylor, Leus Wilson, Anderson Wilson, Lane Wilson, Bicy Wilson, George Victor, Nancy Victor, by Eli P. Williams, Elmer Williams, and Charles H. Williams, attorneys in fact for all of above parties, all of the State of Oklahoma, and Eli P. Williams and P. E. Heckman, are held and firmly bound unto Joe Anderson, Labitha Anderson, Jesse T. Kincannon and Sidney G. Kincannon, in the full and just sum of Five Hundred (\$500.00) Dollars, to be paid to the said Defendants in Error, their successors, administrators and assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of July, 1912.

Whereas, lately at a regular term of the United States Circuit Court for the Eastern District of the State of Oklahoma, in a suit pending in said Court, wherein the Plaintiffs in Error above named were Plaintiffs, and the Defendants in Error above named were Defendants, judgment was rendered against the said Plaintiffs in Error, and in favor of the said Defendants in Error, and the said Plaintiffs in Error have obtained a writ of error in the United States Supreme Court, to reverse the judgment in the aforesaid suit, and citation directed to the Defendants in Error, citing and admonishing them to be

and appear in the United States Supreme Court in the City of Washington, D. C., thirty (30) days from and after said citation.

Now, the condition of the above obligation is such, that if the said Plaintiffs in Error shall prosecute said error to effect, and answer all costs if they fail to make good their plea, then this obligation to be void, else to remain in full force and virtue.

SIMON TAYLOR,
MELVINA TAYLOR,
LEUS WILSON,
ANDERSON WILSON,
LANE WILSON,
BICY WILSON,
GEORGE VICTOR,
NANCY VICTOR,
By ELI P. WILLIAMS,
Attorneys in Fact.
ELI P. WILLIAMS.
P. E. HECKMAN.

Approved:

RALPH E. CAMPBELL,
*Judge of the United States District
Court for the Eastern District of Oklahoma.*

Endorsed: Filed July 16, 1912. R. P. Harrison, Clerk.

No. 3656.

SIMON TAYLOR et al., Plaintiffs in Error,
vs.
JOE ANDERSON et al., Defendants in Error.

To the Clerk of the United States District Court for the Eastern District of Oklahoma, Muskogee, Oklahoma.

DEAR SIR: You will please make up transcript of the record for the United States Supreme Court in the case of Simon Taylor et al., plaintiffs in error, vs. Joe Anderson, et al., defendants in error, and include in said transcript the

- 1st Original petition and the exhibits thereto.
- 2nd. The demurrer of the defendant filed September 9, 1908, to the original petition.
- 3rd. The confession of the demurrer by plaintiff of December 6, 1909.
- 4th. First amended complaint filed on December 6th 1909.
- 5th. Demurrer of the defendant to the first amended complaint filed December 15th, 1909.
- 6th. Order of Court February 21, 1910, sustaining demurrer to first amended complaint and giving plaintiff further time to plead.
- 7th. Second amended complaint of the plaintiff filed March 1st, 1910.

8th. Demurrer to second amended complaint filed March 5th, 1910.

9th. Stipulation for submission of demurrer to second amended complaint, filed March 29, 1910.

10th. The submission of demurrer to second complaint April 4, 1910.

11th. Memoranda of opinion by Judge Campbell filed March 4, 1911.

12th. Decree of Court sustaining demurrer filed March 4, 1911.

13th. Assignment of error.

14th. Petition for writ of error.

15th. Bond on writ of error.

16th. Writ of error, with return.

17th. Citation to defendants in error.

18th. Mandate of the United States Circuit Court of Appeals for the Eighth Circuit, dismissing said cause for want of jurisdiction.

The petition for writ of error to the Supreme Court of the United States, assignment of errors, bond on writ of error, writ of error and the addition thereto of the original citation, the acceptance of service and acceptance of service of a copy of this precipae and waiver of suggestion for additional record.

N. B. MAXEY,

Attorneys for Plaintiffs in Error.

Endorsed: Filed July 20, 1912. R. P. Harrison, Clerk.

UNITED STATES OF AMERICA,

Eastern District of Oklahoma, ss:

I, R. P. Harrison, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record and proceedings had in the Case of Simon Taylor, et al., vs. Joe Anderson, et al., as was ordered to be prepared and authenticated, together with the original Writ of Error, as the same appears from the record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Muskogee, Oklahoma, this 19th day of August A. D. 1912.

[Seal of the United States District Court,
Eastern District of Oklahoma.]

R. P. HARRISON, *Clerk.*

By H. E. BOUDINOT, *Deputy.*

*Writ of Error.*UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the Honorable Ralph E. Campbell, Judge of the Circuit Court of the United States for the Eastern District of the State of Oklahoma, Sitting at Muskogee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which — in said United States Circuit Court before you at the January Term thereof, between Simon Taylor, Melvina Taylor, Leus Wilson, Anderson Wilson, Lane Wilson, Bicy Wilson, George Victor, Nancy Victor, by Eli P. Williams, Elmer Williams, and Charles H. Williams, Attorneys in Fact for all of above named parties, Plaintiffs in Error, and Joe Anderson, Labitha Anderson, Jesse T. Kincannon and Sidney G. Kincannon, Defendants in Error, a manifest error hath happened, to the great damage of the said Plaintiffs in Error, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, at the City of Washington, D. C., together with this writ, so that you have the said record and proceedings aforesaid at the City of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court, on or before the 15 day of August 1912, to the end that the record and proceedings aforesaid, being inspected, the United States Supreme Court may cause further to be done therein to correct that error what of right and according to law and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 16 day of July, 1912.

Issued at office in the City of Muskogee, Oklahoma, with the seal of the United States District Court for the Eastern District of the State of Oklahoma hereto affixed the day last above written.

[Seal of the United States District Court,
Eastern District of Oklahoma.]

R. P. HARRISON,
*Clerk of the District Court of the United
States for the Eastern District of Oklahoma.*
By H. E. BOUDINOT, *Deputy.*

Allowed by:

RALPH E. CAMPBELL,
*Judge of the United States District Court
for the Eastern District of the State of Oklahoma.*

Return to Writ.

UNITED STATES OF AMERICA,

— *Division of the Eastern District of Oklahoma, ss:*

In obedience to the command of the within writ, I herewith transmit to the United States Supreme Court, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribed my name, and affix the seal of said District Court, at office in the City of Muskogee, this 10th day of August A. D. 1912.

[Seal of the United States District Court,
Eastern District of Oklahoma.]

R. P. HARRISON,

*Clerk of Said Court,*By H. E. BOUDINOT, *Deputy.*

[Endorsed:] Writ of Error. Filed Jul- 16, 1912. R. P. Harrison, Clerk U. S. District Court.

Certificate of Question of Jurisdiction.

In the United States Circuit Court, Eastern District of Oklahoma.

SIMON TAYLOR, MELVINA TAYLOR, ANDERSON WILSON, LEUS WILSON, Lane Wilson, Bicy Wilson, George Victor, Nancy Victor, by Eli P. Williams, Elmer Williams, and Charles H. Williams, Attorneys-in-Fact for All of the Above Named Parties, Plaintiffs,

vs.

JOE ANDERSON, LABITHA ANDERSON, JESSE T. KINCANNON, SIDNEY G. KINCANNON, Defendants.

Certificate.

The Circuit Court of the United States for the Eastern District of the State of Oklahoma hereby certifies to the Supreme Court of the United States that on the fourth day of March, 1911, a judgment was entered in above entitled action pursuant to the decision of said court sustaining a demurrer filed by the defendants, Joe Anderson, Labitha Anderson, Jesse T. Kincannon, Sidney G. Kincannon, to the Second Amended Complaint of the foregoing plaintiffs on all the grounds specified in said demurrer, namely:

"That this court hath no jurisdiction of this question for the reason that no federal question is involved, and humbly pray the judgment of the court as to whether the defendants herein be required further to plead".

A copy of Second Amended Complaint and Demurrer is contained

in the judgment roll filed herein to which reference is had for a more particular description thereof.

On March 4, 1911 the following decree was entered in this action:

"It is therefore considered, adjudged and decreed by the court that said demurrer be and the same is hereby sustained and
101 this cause dismissed for want of jurisdiction to which decree the plaintiffs then and there in open court excepted.

And this court further certifies that in said cause the jurisdiction of this court is in issue, and further certifies to the Supreme Court of the United States said question of jurisdiction raised by said demurrer to the Second Amended Complaint.

Dated Muskogee, Oklahoma, September 5th, 1912.

RALPH E. CAMPBELL,
United States Judge.

Attest:

[Seal of the United States District Court,
Eastern District of Oklahoma.]

R. P. HARRISON, *Clerk.*

[Endorsed:] 772/23347. No. —. In the United States Circuit Court, Eastern District of Oklahoma. Simon Taylor et al., Plaintiff, vs. Joe Anderson et al., Defendant. Certificate.

[Endorsed:] File No. 23,347. Supreme Court U. S., October Term, 1912. Term No. 772. Simon Taylor et al., Plaintiffs in Error, vs. Joe Anderson et al. Certificate of question of jurisdiction. Filed September 10, 1912.

In the Supreme Court of the United States.

No. —.

SIMON TAYLOR, MELVINA TAYLOR, LEUS TAYLOR, ANDERSON WILSON, Lane Wilson, Bicy Wilson, George Victor, Nancy Victor, by Eli P. Williams, Elmer Williams, and Charles H. Williams, Attorney- in Fact for All of Above Named Parties, Plaintiffs in Error,

vs.

JOE ANDERSON, LABITHA ANDERSON, JESSE T. KINCANNON, and SIDNEY G. KINCANNON, Defendants in Error.

Motion for Alias Summons.

Comes now the above named Plaintiffs in Error and show to the Honorable Ralph E. Campbell, Judge of the United States District Court for the Eastern District of Oklahoma, that on the 16th day of July, 1912, a writ of error was allowed by said Judge and a citation signed as required by law, but Plaintiffs in Error have been unable to have said citation served for the reason that they forwarded said citation to James E. Humphrey, the attorney of record for Defendants in Error, and asked him to accept service of said citation

as he had heretofore done in this cause, and not hearing from the said James E. Humphrey counsel for Plaintiffs in Error wrote him, on the 5th day of August, 1912, asking him to please accept service and return said citation; that on the 7th day of August, 1912, counsel received a letter from the said James E. Humphrey, stating that his connection with said case had been closed and he had no authority to accept service, but omitted to return the citation which had been sent him.

Wherefore, for the reasons above stated, Plaintiffs in Error pray that an alias citation be issued by Your Honor so that proper service may be had in this cause.

N. B. MAXEY,
Attorney for Plaintiffs in Error.

This motion having been presented to me on this 14th day of August, 1912, and it appearing from said motion that Plaintiffs in Error are entitled to an alias citation in this cause, said motion is granted, and an alias citation issued by me on this day.

RALPH E. CAMPBELL,
*Judge of the United States District
Court for the Eastern District of
Oklahoma.*

James E. Humphrey, Attorney at Law, Ardmore, Oklahoma.

AUGUST 7TH, 1912.

Hon. N. B. Maxey, Muskogee, Oklahoma.

DEAR MR. MAXEY: I have before me your letter of the 5th inst., in re case of Williams et al. vs. Anderson et al. in which you ask me to accept service of the citation for an appeal to the Supreme Court of the United States. In reply to the same beg leave to state that my relations as attorney for the defendants have been closed and I am not now the counsel or attorney for Mr. Anderson.

Respectfully,

J. E. HUMPHREY.

Original.

Alias Citation.

UNITED STATES OF AMERICA, ss:

To Joe Anderson, Labitha Anderson, Jesse T. Kincannon, and Sidney G. Kincannon, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at the City of Washington, D. C., within thirty days from the date *herewith*, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Eastern District of Oklahoma, wherein Simon Taylor, Melvina Taylor, Leus Wilson, Anderson Wilson, Lane Wilson, Bicy

Wilson, George Victor and Nancy Wilson, by Eli P. Williams, Elmer Williams and Charles H. Wilson attorneys in fact for all of above named parties, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand this 14th day of August, 1912.

RALPH E. CAMPBELL,
*Judge of the United States District
Court for the Eastern District of
Oklahoma.*

Marshal's Return.

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

Received the within alias citation at Chickasha in said district on August 20th 1912 and served the same 17 miles south east of Marlow in said district by delivering a true copy of the within writ personally to the within-named Jesse T. Kincannon and Sidney G. Kincannon on August 21, 1912 at one o'clock p. m.

The within-named Labitha Anderson not found in my district.

Dated August 22, 1912.

S. G. VICTOR,
U. S. Marshal, Eastern District of Oklahoma,
By THOS. BURKE, *Deputy.*

Fees	4.00
Exp.	6.26
	<hr/> 10.26

Docket #1490.

Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

I hereby certify and return that I served the annexed citation on Writ of Error to the Supreme Court U. S. on the therein-named Joe Anderson, in person, at 2½ miles West of Troy in said District on the fifth day of September, A. D. 1912, 10:30 a. m.

S. G. VICTOR,
U. S. Marshal,
By R. HOOZ, *Deputy.*

Fees	2.00
Expenses	7.42
	<hr/> 9.42

Marshal's Docket No. 1490.

Alias Citation.

UNITED STATES OF AMERICA, ss:

To Joe Anderson, Labitha Anderson, Jesse T. Kincannon, and Sidney G. Kincannon, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at the City of Washington, D. C., within thirty days from the date *herewith*, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Eastern District of Oklahoma, wherein Simon Taylor, Melvina Taylor, Leus Wilson, Anderson Wilson, Lane Wilson, Bicy Wilson, George Victor and Nancy Wilson, by Eli P. Williams, Elmer Williams and Charles H. Wilson, attorney-in fact for all of above named parties, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand this 14th day of August, 1912.

RALPH E. CAMPBELL,

*Judge of the United States District
Court for the Eastern District of
Oklahoma.*

U. S. Marshal's Return.

WESTERN DISTRICT OF OKLAHOMA, ss:

I received the within citation August 27th 1912, at Guthrie, Oklahoma, and executed the same August 29th 1912, at Oklahoma City, Oklahoma, by leaving a true copy thereof with the within named Labitha Anderson, personally.

W. G. CADE,

U. S. Marshal.

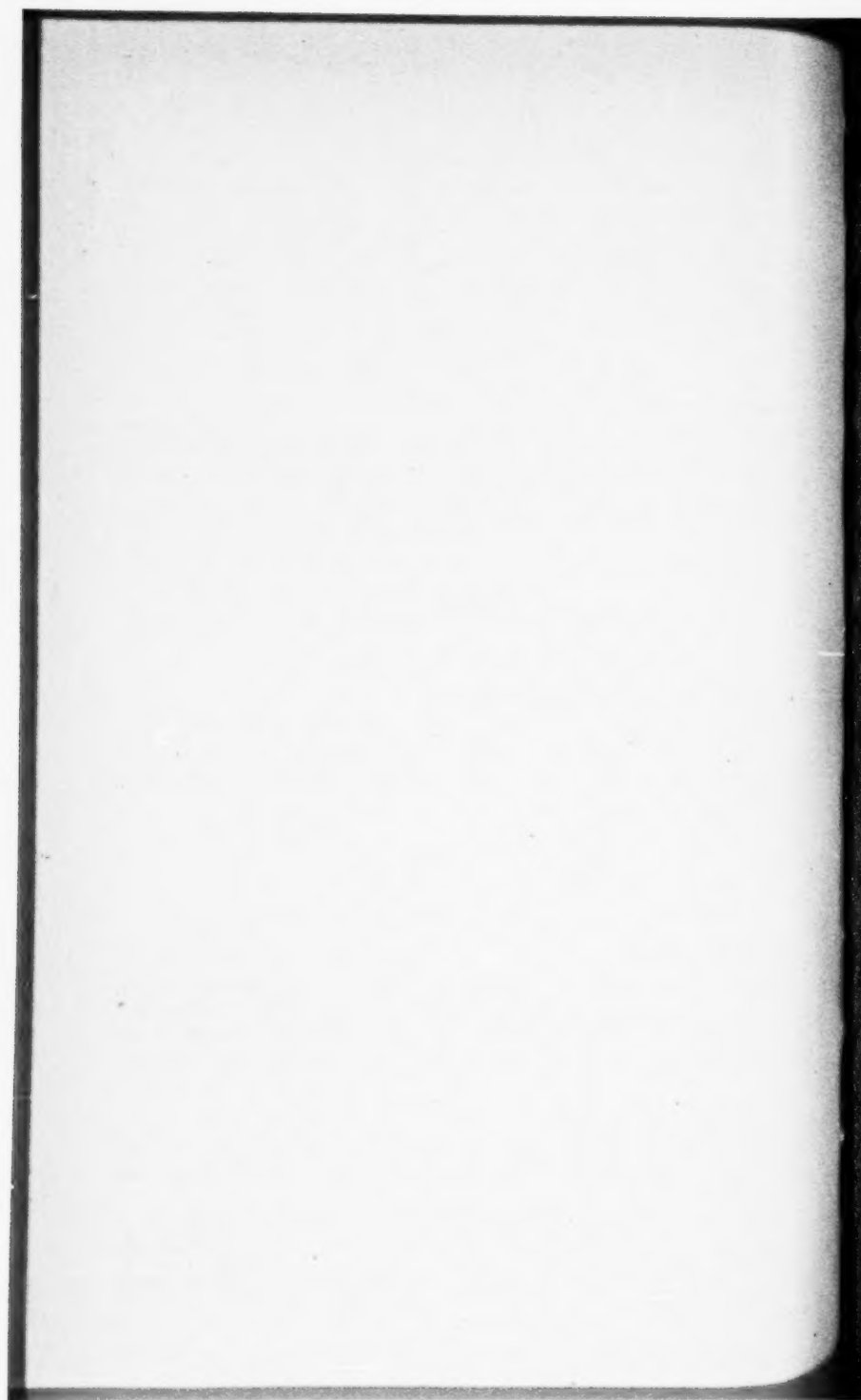
Fees	\$2.00
Exp.	2.50
Total	\$4.50

[Endorsed:] Marshal's Docket No. 1490. U. S. Marshal's Office, Guthrie, Okla., Aug. 27, 1912. No. 1556. Page 270. Docket #4.

[Endorsed:] 772/23347. No. —. In the Supreme Court of the United States. Simon Taylor et al., Plaintiffs, vs. Joe Anderson et al., Defendants. Motion for Alias Summons and return of alias.

[Endorsed:] File No. 23,347. Supreme Court U. S., October Term, 1912. Term No. 772. Simon Taylor et al., Plaintiffs in Error, vs. Joe Anderson et al. Motion and order for alias citation, and alias citation with proof of service of same. Filed September 10, 1912.

Endorsed on cover: File No. 23,347. E. Oklahoma C. C. U. S. Term No. 772. Simon Taylor, Melvina Taylor, Leus Wilson, et al., plaintiffs in error, vs. Joe Anderson, Labitha Anderson, Jesse T. Kincannon, and Sidney G. Kincannon. Filed September 3, 1912. File No. 23,347.



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1960



In the
SUPREME COURT *of the* UNITED STATES.
October Term, 1912

No. 772.
(23347.)

SIMON TAYLOR, MELVINA TAYLOR and LEUS
WILSON, ANDERSON WILSON, LANE WIL-
SON, BICY WILSON, GEORGE VICTOR,
NANCY VICTOR, by ELI P. WILLIAMS, EL-
MER WILLIAMS and CHARLES H. WIL-
LIAMS, Attorney in Fact for All the Above
Named Parties, *Plaintiffs in Error,*

vs

JOE ANDERSON, LABITHA ANDERSON, JESSE
T. KINCANNON and SIDNEY G. KIN-
CANNON, *Defendants in Error.*

BRIEF *and* ARGUMENT *in* SUPPORT *of*
MOTION *to* ADVANCE.

This is an action commenced by the plaintiffs
in error in the United States Court for the East-
ern District of Oklahoma against the defendants
in error, to recover certain real estate mentioned

in plaintiffs' petition. The cause was submitted to the court below on the second amended complaint of plaintiffs in error and the demurrer to the jurisdiction by the defendants in error to said second amended complaint; said pleadings and judgment of the court thereon were as follows:

Heretofore, there was filed in this court by the plaintiffs in error a motion to advance this cause on the docket and said motion is in words and figures as follows, to-wit:

Motion to Advance Cause on Docket.

(Omitting Caption.)

Comes now the above named plaintiffs in error, by Napoleon B. Maxey, their attorney, and move the court to advance the above entitled cause on the docket under rule 32 of this Honorable Court; that this cause was brought to this court by writ of error, and the only question in issue is the question of the jurisdiction of the court below, as will more fully appear from the certificate of question of jurisdiction by the Honorable RALPH E. CAMPBELL, Judge of the United States Court for the Eastern District of Oklahoma, found on page 55, of the printed record in this cause, and for such other and further orders as to the court shall seem meet and proper.

Dated this 18th day of November, 1912.

N. B. MAXEY,

Attorney for Plaintiffs in Error.

Second Amended Complaint.

(Omitting Caption.)

Come now the plaintiffs, and after leave of court first being had and obtained, file this, their second, amended complaint:

The plaintiffs state:

That they are the owners in fee of the following described lands, to-wit:

The southwest quarter of the northwest quarter and the southwest quarter of the southeast quarter, and the west half of the southeast quarter of the southeast quarter of Section fourteen (14), and the west half of the southwest quarter of the southeast quarter of Section fifteen (15), Township One (1) North, of Range Six (6) West (Chickasaw Nation), of the Indian Base and Meridian in Oklahoma, containing One Hundred and Twenty (120) acres, and

That the defendants are in the unlawful possession of said land, claiming the same as their own, and refuse to surrender possession to plaintiffs or attorn to them for the rents and profits arising from said land.

That the matter in dispute in this suit exceeds exclusive of interest and costs the sum or value of Five Thousand Dollars (\$5000.00), and arising under the Constitution or laws of the United States or treaties.

That plaintiffs derived title to the above described land through one Mary Mitchell, a full-blood Choctaw Indian, the allottee of said land, and to whom the Choctaw and Chickasaw Nations executed an allotment patent, approved by the Secretary of the Interior of the United States, a certified copy of said patent is attached to the original complaint in this case, and marked Exhibit "A," and which is hereby referred to and made a part of this second amended complaint. That said patent contained the following provision:

"Subject, however, to the provisions of the Act of Congress approved July 1, 1902 (32 Stat. 641.)"

That on account of said clause in said patent, the entire Act of Congress becomes a part of said patent, and a copy of sections 15, 16, 68 and 73 of said act read as follows:

"15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided."

"16. All lands allotted to the members of said tribes, except such lands as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years in each case from date of patent; *provided*, that such land shall not be

alienated by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value."

"68. No Act of Congress or treaty provision, nor any provision of the Atoka Agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw Nations."

"73. This agreement shall be binding upon the United States and upon the Choctaw and Chickasaw Nations, and all Choctaws and Chickasaws, when ratified by Congress and by a majority of the whole number of votes cast by the legal voters of the Choctaw and Chickasaw tribes in the manner following: The principal chief of the Choctaw Nation, and the governor of the Chickasaw Nation shall, within one hundred and twenty days after the ratification of this agreement by Congress, make public proclamation that the same shall be voted upon at any special election to be held for that purpose within thirty days thereafter, on a certain day therein named; and all male citizens of each of the said tribes qualified to vote at the election precinct most convenient to his residence, whether the same be within the bounds of his tribe or not. And if this agreement be ratified by said tribes as aforesaid, the date upon which said election is held shall be deemed to be the date of the final ratification."

That in open violation of the restrictions against alienation of said land contained in the foregoing Act of Congress, and in the patent,

said Joe Anderson, one of the defendants in this action, induced Simon Taylor, Melvina Taylor, Leus Wilson, Anderson Wilson, Lane Wilson and Bicy Wilson, to execute and deliver to Joe Anderson an illegal deed for said land, and said illegal deed is dated July 31, 1905, and the consideration stated in said illegal deed is Seven Hundred and Fifty Dollars (\$750.) That Seven Hundred and Fifty Dollars is the total price that Joe Anderson paid for said land, which was a wholly inadequate price, that said land was in fact worth more than six times said price.

That all of said plaintiffs and grantors in the illegal deed to Joe Anderson are Indians by blood, and are wholly ignorant of said land values, and are in need of and entitled to the protection of said restrictions against the alienation of said land contained in said patent and in said Act of Congress.

That the patent to Mary Mitchell to said land was approved by the Department of the Interior September 20, 1905, and the illegal deed to Joe Anderson before mentioned, is dated July 31, 1905; that on the date of said illegal deed to Joe Anderson, said land was not alienable under the Act of Congress approved July 1, 1902 (32 Stat., 641).

That under said Act of Congress, said land was allotted and the title acquired thereto.

That the plaintiffs claim the title to said land

and the right to the possession and rents thereof under the last mentioned Act of Congress.

That Joe Anderson and Labitha Anderson, his wife, have since attempted to convey said land to Jesse T. Kincannon.

That the plaintiffs and grantors in the before mentioned illegal deed to Joe Anderson had no power to convey said land on the date of said illegal deed, and said illegal deed is repugnant to an Act of Congress, approved July 1, 1902 (32 Stat. 641), and to an Act of Congress approved April 26, 1906, and is an impeachment and impairment of the title to said land of the plaintiffs derived from the United States under said Act of Congress, to the great property loss and damage of the plaintiffs, and is repugnant to the Constitution of the United States and is null and void.

That Mary Mitchell is a full-blood Choctaw Indian; that Mary Mitchell died before July 31, 1905, leaving the plaintiffs as her sole and only heirs at law, and said heirs are full-blood Choctaw Indians, and are the owners in fee of said land, and who are now, and have ever since the death of the said Mary Mitchell, been entitled to the possession of said land, and said land is not now, nor never has been alienable under the Acts of Congress approved July 1, 1902 (32 Stat. 641), and the Act of Congress approved April 26, 1906, without the approval of the Secretary of the Interior, and the

Secretary of the Interior has not approved the sale of said land.

That the primary question to be determined in this case involves a construction of the Acts of Congress above referred to, as it is the contention of the plaintiffs that the deed executed by plaintiffs to defendant, Joe Anderson, is void by reason of the restriction on alienation contained in said Acts of Congress, and if plaintiffs' contention in this particular is not sustained, they must fail in this action; that it is the contention of the defendants that, notwithstanding the restriction imposed by said Acts of Congress, that plaintiffs had a right to convey at the time they executed said deed, and that the defendant, Joe Anderson, took good title, and if contention in this regard is not sustained, the plaintiffs fail in this action, so that this case cannot be decided without a construction by the court of the Acts of Congress above referred to.

That the defendants unlawfully and by force took possession of said land, and unlawfully and by force retain possession of said land, and the defendants have no title or interest in or to said land, or any right of possession, and are trespassers on said land and said possession of said defendants is repugnant to the Act of Congress approved July 1, 1902 (32 Stat., 641), and also to an Act of Congress approved April 26, 1906, and the plaintiffs invoke the protection of said Acts of Congress and of this court.

That the above described land is reasonably worth an annual rental value of the sum of \$250.00 per year, and that plaintiffs are entitled to recover that sum from the defendants as rent for said land for each year since January 1st, 1906.

For authority of plaintiffs to bring this suit, they refer to copies of the powers of attorney of all of the plaintiffs in this suit, attached to the original complaint filed herein, marked Exhibits B, C, D and E, and made a part of this second amended complaint.

Wherefore, the plaintiffs pray for a judgment cancelling and annulling the illegal deed executed by Simon Taylor, Melvina Taylor, Leus Wilson, Anderson Wilson, Lane Wilson and Bicy Wilson to Joe Anderson, and the deed from Joe Anderson and Labitha Anderson to Jesse T. Kincannon, and for a judgment annulling all the interest of the defendants in said land and the rents thereof and the improvements thereon, and a judgment for the possession of said above described land, as against the defendants, and all persons holding under, by or through said defendants, and for judgment for the rents and profits of said land, in the sum of \$250.00 for each and every year since January 1st, 1906, and for cost of this suit, and for general and special relief.

MAXEY, LEAHY & CAMPBELL,

Attorneys for Plaintiffs.

(See pages 24-28 printed record.)

Demurrer to Second Amended Complaint.

(Omitting Caption.)

Come now the defendants, by their attorney, James E. Humphrey, Esq., and present this, their demurrer, in the above entitled cause, and say that this court hath no jurisdiction of this cause, for the reason that no federal question is involved, and humbly pray the judgment of the court as to whether the defendants herein be required further to plead.

JAMES E. HUMPHREY,
Attorney for Defendants.

(See page 28, printed record.)

Decree, March 4, 1911.

(Omitting Caption.)

Now, on this 4th day of March, 1911, at a regular term of this court, this cause came on for hearing upon the demurrer of the defendants herein to the jurisdiction of this court to hear and determine said action; the plaintiffs, Simon Taylor, Melvina Taylor, Leus Wilson, Anderson Wilson, Lane Wilson, Bicy Wilson and George Victor, appearing by their attorneys, Maxey, Campbell and Beall, and the defendants, Joe Anderson, Labitha Anderson, Jesse T. Kincannon and Sidney Kincannon, appearing by their attorney, James E. Humphrey.

Thereupon said cause was submitted to the court upon oral argument and briefs filed by the parties hereto, and the court being fully advised, is of opinion that said demurrer is well taken and that said cause should be dismissed for want of the jurisdiction of the court to hear and determine the same.

It is therefore considered, adjudged and decreed by the court, that said demurrer be, and the same is, hereby sustained and this cause dismissed for want of jurisdiction, to which decree the plaintiffs then and there in open court excepted.

RALPH E. CAMPBELL,

Judge.

(See pages 41-42, printed record.)

Certificate.

(Omitting Caption.)

The Circuit Court of the United States for the Eastern District of the State of Oklahoma hereby certifies to the Supreme Court of the United States that, on the fourth day of March, 1911, a judgment was entered in above entitled action pursuant to the decision of said court sustaining a demurrer filed by the defendants, Joe Anderson, Labitha Anderson, Jesse T. Kincannon, Sidney G. Kincannon, to the second amended complaint of the foregoing plaintiffs on all the grounds specified in said demurrer, namely:

“That this court hath no jurisdiction of this question, for the reason that no federal question is involved, and humbly pray the judgment of the court as to whether the defendants herein be required further to plead.”

A copy of said amended complaint and demurrer is contained in the judgment roll filed herein, to which reference is had for a more particular description thereof.

On March 4, 1911, the following decree was entered in this action:

“It is therefore considered, adjudged and decreed by the court, that said demurrer be, and the same is hereby, sustained, and this case dismissed for want of jurisdiction, to which decree the plaintiffs then and there in open court excepted.”

And this court further certifies that in said cause the jurisdiction of this court is in issue, and further certifies to the Supreme Court of the United States said question of jurisdiction raised by said demurrer to the second amended complaint.

Dated, Muskogee, Oklahoma, September 5th, 1912.

RALPH E. CAMPBELL,
United States Judge.

Attest:

(Seal of the United States District Court,
Eastern District of Oklahoma.)

R. P. HARRISON, *Clerk.*

(See pages 55-56, printed record.)

It will be observed from the foregoing pleadings and judgment of the court, that the only question passed upon by the court below was the question of jurisdiction.

It will be observed, also, that the assignment of errors found on pages 50-51 of the printed record, present only the question of jurisdiction.

Wherefore, plaintiffs in error pray that this Honorable Court grant their motion to advance this cause, and that the same be set down for hearing on its merits at an early date to be fixed by the court.

NAPOLEON B. MAXEY,

Attorney for Plaintiffs in Error.



FILED
FEB 24 1914
JAMES D. MAHER
CLERK

**In the Supreme Court of the
United States,
October Term, 1913.**

NO. 338

**SIMON TAYLOR, MELVINA TAYLOR, LEUS
WILSON, ET AL, PLAINTIFFS IN ERROR,**

vs.

**JOE ANDERSON, LABITHA ANDERSON, JESSE T.
KINCANNON, AND SIDNEY G. KINCANNON.**

**IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF OKLAHOMA.**

BRIEF OF PLAINTIFFS IN ERROR

**NAPOLEON B. MAXEY,
Attorney for Plaintiffs in Error.**

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In the Supreme Court of the United States, October Term, 1913.

No. 338

Simon Taylor, Melvina Taylor and Leus Wilson, Anderson Wilson, Lane Wilson, Bicy Wilson, George Victor, Nancy Victor, By Eli P. Williams, Elmer Williams and Charles H. Williams, Attorney in fact for all the above named parties, Plaintiffs in error.

vs.

Joe Anderson, Labitha Anderson, Jesse T. Kincannon and Sidney G. Kincannon, Defendants in Error.

STATEMENT

In July, 1908, this suit was brought in the United States Circuit Court, Eastern District of Oklahoma, by plaintiffs in error, hereinafter called plaintiffs, against the defendants in error, hereinafter called defendants, to recover the land involved herein, and rents thereof. Said lands was formerly a part of the tribal lands of the Choctaw tribe of Indians; that it was allotted to Mary Mitchell, a full-blood Choctaw Indian, as her allotment other than homestead under the Act of Congress of July 1, 1902 (32 Stat. 641), commonly known as Supplemental Agreement.

That by the terms of said agreement all lands were inalienable for a period of one year from and after the date of the Patent to the allottee.

That the Patent to Mary Mitchell is dated September 20, 1905 (Record 3, 4); that Mary Mitchell died intestate before July 31, 1905, and prior to receiving her Patent to the land; that her heirs, who are full-blood Choctaw Indians and the plaintiffs herein, sold (or attempted to sell) said land July 31, 1905, to the adverse claimants (Record 26) prior to the expiration of one year from the date of Patent to Mary Mitchell; that said sale and the deed executed by these heirs July 31, 1905, on which the title of the adverse claimants is rested, is illegal and void, and the adverse claimants have no title to said land because said land was not alienable on the date of above deed under the patent (Record 3, 4) to Mary Mitchell and was not alienable under the Federal law, to-wit: the Act of Congress of July 1, 1902 (32 Stat. 641) under which said land was allotted and the title acquired.

The issues in this suit are presented by the Second Amended Complaint (Record 24 to 28); the demurrer thereto (Record 28); and the final decree of the trial Court of March 4, 1911 (Record 41, 42) sustaining said demurrer and dismissing this cause for want of jurisdiction.

Said demurrer was sustained by the trial court upon the ground that no Federal question is involved (for demurrer and memorandum of opinion of trial court see

Record 28 to 41 inclusive.) We submit that if the logic of this opinion is correct, then no suit may be brought in the Federal courts, provided defendant chooses to demur on the ground of jurisdiction, unless there be diversity of citizenship.

Plaintiffs contend that the trial court was in error; that there is a Federal question involved in this suit, because the land in controversy is the allotment and restricted lands of full-blood Indian allottees under and controlled by Federal laws.

That the defendants' possession thereof (which is alleged in the complaint and admitted by the demurrer) is an impeachment and impairment of the plaintiff's rights under the Federal laws and is repugnant thereto, and so is the title claimed by defendants; that the plaintiffs' right to recover in this suit is controlled by Federal laws all of which will appear by plaintiff's second amended complaint and the demurrer there to (see Record 24 to 48 inclusive, and defendants' demurrer, Record 28).

On July 14, 1911 (Record 44, 45) an appeal was taken by Writ of Error from the final decree referred to above, of the trial court to the United States Circuit Court of Appeals (Record 44 to 47), and January 11, 1912, and Writ of Error was dismissed by said Court for want of jurisdiction (Record 48, 49).

This case is appealable direct to this Honorable

Court because the jurisdiction of the trial court is in issue. This fact will appear by the final decree of the trial court of March 4, 1911, dismissing this cause for want of jurisdiction (Record 41, 42), and it will also appear from the certificate of the trial judge of the question of jurisdiction to the Supreme Court of the United States [Record 55, 56].

In this case, however, no certificate by the trial judge of the question of jurisdiction is required because the decree appealed from shows upon its face that the sole question decided was one of jurisdiction.

Davis vs. Cleveland C. C. & St. L. R. Co. 217 U. S. 157 [Point decided 171]

Excelsior Wooden Pipe Line Co. vs. Pacific Bridge Co., 185 U. S., 282 [point decided on page 285.]

And it will also appear from the case cited above [185] U. S., p. 285], that the fact of this case having been appealed [under a misapprehension of the law] to the United States Circuit Court of Appeals, Eighth Circuit, and dismissed by said court for want of jurisdiction, will in no way effect the right of appeal to this court in this case.

July 16, 1912, [Record 54] an appeal was taken herein, direct to this Honorable Court and is now before you for decision.

In the trial court below there were three assignment of errors [Record 50, 51], and we now rely on said errors, which are as follows (omitting caption):

Assignment of Errors and Prays for Relief.

Comes now the Plaintiffs in Error, in order above named, and say:

That in the foregoing decree and proceedings there is manifest error in the action, ruling, opinion, and judgment of the United States Circuit Court for the Eastern District of Oklahoma, in this, to-wit:

I.

The Court erred in sustaining the demurrer of the Defendants in Error to the second amended complaint of the Plaintiffs in Error, and dismissing its suit for want of jurisdiction of the Court to hear and determine the same.

II.

The Court erred in not overruling the demurrer of the Defendants in Error to the second amended complaint of the Plaintiffs in Error, and erred in not taking jurisdiction of said cause, and trying the same on its merits.

III.

The Court erred in dismissing the second amended complaint of Plaintiffs in Error, for want of jurisdiction, and rendering judgment against them for costs.

Wherefore, the Plaintiffs in Error pray that said proceedings, as well as the judgment of the United States Circuit Court for the Eastern District of Oklahoma, be reversed, set aside and held for naught. And a judgment as prayed for in the second amended complaint (Record 27, 28).

Brief and Argument.

'The plaintiffs' right of recovery in this suit is rested upon the second amended complaint (Record 24 to 28) which is in substance as follows:

Plaintiffs first set up their cause of action in the statutory short form. They then set up their cause of action in detail.

They show that the land in this suit was formerly a part of the tribal lands of the Choctaw tribe of Indians; that it was allotted by Mary Mitchell, a full-blood Choctaw Indian, (as her share and portion other than homestead, of the lands of said tribe) under the Act of Congress of July 1, 1902 (32 Stat. L. 641), commonly known and spoken of as the Choctaw-Chickasaw Supplemental Agreement; that by the terms of said agreement all allotted lands were inalienable for a period of one year, from and after the date of the patent, by the allottee or the full-blood heirs thereof.

That the patent to Mary Mitchell is dated September 20, 1905, and Mary Mitchell died intestate before July 31, 1905, leaving plaintiffs her sole and only heirs who are full-blood Choctaw Indians.

That the deed of plaintiffs to Joe Anderson under which the defendants claim title to said land is

dated July 31, 1905, and as this deed is dated before the patent was issued, it is apparent on the face of this deed that said land was not alienable thereunder, and that said deed is illegal and void.

Plaintiffs contend that said illegal deed to Joe Anderson is repugnant to the Act of Congress of July 1, 1902 [32 Stat. L. 641] and the Act of Congress of April 26, 1906, [34 Stat. L. 137] and is repugnant to the constitution of the United States, and is an impeachment and impairment of the title to said land of plaintiffs derived from the United States, to their great property loss and damage, and is illegal and void.

We quote the following from plaintiffs' second amended complaint (Record 27).

"That the primary question to be determined in this case involves a construction of the Acts of Congress above referred to, as it is the contention of the Plaintiffs that the deed executed by Plaintiffs to the Defendant, Joe Anderson, is void by reason of the Restriction on Alienation contained in said Acts of Congress, and if Plaintiffs' contention in this particular is not sustained, they must fail in this action; that it is the contention of the Defendants that, notwithstanding the restriction imposed by said Acts of Congress, that Plaintiffs had a right to convey at the time they executed said deed, and that the Defendant, Joe Anderson, took good title, and if Defendant's contention in this regard is sustained, the Plaintiffs fail in this action, so that this case cannot be decided without a construc-

tion, by the Court, of Acts of Congress above referred to.

That the defendants unlawfully and by force took possession of said land and the defendants have no title or interest in or to said land or any right of possession, and are trespassers on said land and said possession of said defendants is repugnant to the act of Congress, approved July 1, 1902, (32 Stat., 641), and also to an act of Congress approved April 26, 1906, and the plaintiffs invoke the protection of said acts of Congress and of this Court.

That the above described land are reasonably worth an annual rental value of the sum of \$250.00 per year, and that plaintiffs are entitled to recover that sum from the defendants as rent for said land for each year since January 1st, 1906."

Plaintiffs contend that the right to bring this suit as they did in the United States Court was conferred by the acts of Congress and Federal laws set out in plaintiffs complaint and also by Act of Congress of May 27, 1908 (35 Stat. 312). Said Act is in part as follows:

"And said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottees having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution

and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands."

The clear intent of above Act is that suits, as the one at bar for the recovery of restricted lands, are maintainable in the name of the allottee and shall be brought at his request, and that it is the duty of the representatives of the Secretary of the Interior to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.

Hickman vs United States, 224 U. S. 413.

Adverse possession of Indian allottees' restricted lands raises a federal question because the allottee has the right to recover the possession of his restricted lands under the Federal laws, and because under the Oklahoma laws, in an action for recovery of real estate, it is necessary, for plaintiff to state in his petition briefly that he is entitled to the possession of the land involved, and that the defendant unlawfully keeps him out of possession.

The necessary allegations set out above, required under the Oklahoma statute for recovery of real estate it seems must present a federal question when the restricted lands of an Indian allottee are involved, as in the case at bar.

The Joy Case.

The trial court in sustaining the demurrer which was, in effect, holding that there was no Federal question involved in this case and in dismissing this case for want of jurisdiction, relied on the case of Joy vs. The City of St. Louis, 201 U. S., 332.

We believe that the trial court has taken a wrong view of the Joy case, and therefore reached a wrong conclusion in the case at bar, for if the decision of the trial court in the case at bar is the law, it seems impossible to suggest a case where recovery of land could be had in an ejectment suit in the United States Court in Oklahoma if jurisdiction and right of recovery is rested on an Act of Congress or Federal law, should the adverse party see fit to demur to the jurisdiction of the court upon the grounds that no Federal question is involved. We quote the following from the Joy case (p. 342).

"In this case the real dispute, as stated by the plaintiff, is whether plaintiff is entitled to the land formed by accretion, which has taken place many years since the patent was issued and since the acts of Congress were passed. There is no dispute as to the terms of the patent or of the acts of Congress. The language of the averment in the petition (which is set out in full in the foregoing statement of facts) shows that the controversy in dispute is not at all in regard to the land covered by the letters patent or by the acts of Congress, and no dispute is alleged to exist as to such land, but the dispute relates to land, "which land is a portion of the land formed by accretions or gradual deposits from said river, along said west bank thereof, be-

tween said north and south lines of said outlet, confirmation, and surveys, and which thereby became a portion of the land granted by said letters patent and acts of Congress approved June 13th, 1812, and June 6th, 1874, respectively."

It appears from above quotation, briefly, that there was no dispute in the Joy Case as to the land covered by the letters patent or by the act of Congress. The reverse is true in the case at bar, for the plaintiffs contend in the case at bar that the possession of said land by defendants, which is admitted by the demurrer, is repugnant to and violative of the patent and acts of Congress set out in their complaint.

In the Joy case no Federal question could be truthfully asserted in the complaint because there was no Federal question involved in the controversy. We quote the following from the Joy case (page 343):

"As this land in controversy is not the land described in the letters patent or the acts of Congress, but, as is stated in the petition, is formed by accretions or gradual deposits from the river, whether such land belongs to the plaintiff is, under the cases just cited, a matter of local or state law, and not one arising under the laws of the United States."

The Joy case should not be controlling in the case at bar because these two cases are entirely different in every essential point.

In the Joy case it will be remembered that the defendant company filed an answer denying all the allegations of the petition. It also set up that it held the premises under the city of St. Louis.

In the case at bar defendants demurred and thereby admitted all the facts alleged in appellants' complaint.

In the Joy case no Federal question existed or was asserted and no dispute was alleged to exist as to the land conveyed by the patent or acts of Congress, and it was apparent upon the face of the pleadings in the Joy case that no question of a Federal nature was involved because the land in controversy was not covered by the patent or acts of Congress, and was not controlled or affected by Federal law, but was solely controlled by local or state law.

The reverse is true in the case at bar. The land involved is covered by the patent and acts of Congress, and the right of possession to said land and the right of alienation thereof is solely controlled by Federal law, and it is contended that the attempted alienation by plaintiffs and the adverse possession of said land by defendants is repugnant to said Federal laws and to the Constitution of the United States.

**State Laws Providing for Recovery of Real Property Upon
Equitable Title is only Binding in State Courts and
Has No Force in Federal Courts.**

The Court below contends that we should not state any more in our petition than would be necessary if we were bringing the case in the State Court and cite Sec. 6122, Snyder's Compiled Laws of Oklahoma, which is as follows:

“In an action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition that he has the legal or equitable estate therein and is entitled to the possession thereof, describing the same as required by Section 5667, and that the defendant unlawfully keeps him out of possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived.”

This section, in itself, is a refutation of their contention. Under this section, plaintiff can recover in the State Court on a legal or equitable title. But the rule is different in the Federal Courts. In actions in ejectment, the plaintiff must show legal title in himself. It is, therefore, necessary that his petition show legal title in him before he has stated a case. Hence, the necessity ofarraigning his title:

Cook v. Foley. 152 Fed. 41;

Hooper v. Scheimer, 64 U. S. 235;

Fenn v. Holme, 21 How. 482;

Sheirburn v. Cordova, 24 How. 425.

Of course, in the Courts of the State, under the code provision abolishing all distinction between actions at law and suits in equity, the plaintiff in this action might have a recovery, if he establishes any right to the property in controversy superior to that of defendant, whether such superior right should be in its nature legal or equitable. But, in this Court, regardless of the rule of the decision in the Court of the State, in this action at law, the only rights possible of assertion and maintenance by the plaintiff are

legal rights, and for the reason that here the distinction between actions at law and suits in equity is fundamental and jurisdictional. *Cook, et al. v. Foley, et al.*, 152 Fed. 41. That plaintiff may recover he must establish a legal title to the property in controversy in himself.

In *Hooper, et al. v. Scheimer*, 64 U. S. 235, *supra*, Mr. Justice CATRON, delivering the opinion of the Court, said:

"By the statute of Arkansas, an action of ejectment may be maintained where the plaintiff claims possession by virtue of an entry made with the register and receiver of the proper land office of the United States * * *

It is also the settled doctrine of this court, that no action of ejectment will lie on such an equitable title, notwithstanding a State Legislature may have provided otherwise by statute. The law is only binding in the State Courts, and has no force in the Circuit Courts of the Union. *Fenn v. Holme*, 21 How. 482."

In *Fenn v. Holme*, *supra*, Mr. Justice DANIEL, delivering the opinion of the Court, said:

"This is an attempt to assert at law, and by a legal remedy, a right to real property an action of ejectment to establish the right of possession in land.

That the plaintiff in ejectment must in all cases prove a legal title to the premises in himself, at the time of the demise laid in the declaration, and that evidence of an equitable estate will not be sufficient for a recovery, are princi-

ples so elementary and so familiar to the profession as render unnecessary the citation of authority in support of them. Such authority may, however be seen in the cases of *Goodtitle v. Jones*, 7 T. R. 49; of *Doc v. Wroot*, 5 East. 132; and of *Ree v. Head*, 8 T. 118. This legal title the plaintiff must establish either upon a connected documentary chain of evidence, or upon proofs of possession of sufficient duration to warrant the legal conclusion of the existence of such written title."

In *Sheirburn v. Cordova, et al.*, 24 How. 425, *supra*, Mr. Justice CAMPBELL, delivering the opinion of the Court, said:

"By a statute of Texas, 'All certificates for headrights, land scrip, bounty warrants, or any other evidence of right to land recognized by the laws of this Government, which have been located or surveyed, shall be deemed and held as sufficient title to authorize the maintenance of actions of ejectment, trespass, or any other legal remedy given by law.' Hart Dig., Art. 3. 230. The testimony adduced by the plaintiff, it would seem, would have authorized a suit in the courts of Texas, where rights, whether legal or equitable, are disposed of in the same suit. But this court has established, after full consideration, that in the courts of the United States suits for the recovery of land can only be maintained upon a legal title. It is not contended in this case that the plaintiff has more than an incipient equity. This question was so fully considered by the court in *Fenn v. Holme*, 21 How. 481, that a further discussion is unnecessary."

Federal Question Stated.

The petition in this case states more than is necessary, but plaintiff was only trying to meet the suggestions of the trial court, and those statements may be treated as surplusage, and we most earnestly contend that when stripped of all unnecessary allegations, there is still a Federal question stated.

Northern Pacific Ry. Co. v. Saderberg, 188 U. S. 526;

Doolan v. Carr, 125 U. S. 618;

Macon Grocery Co. v. Atl. C. L. R. Co., 215 U. S. 501.

We desire to call the Court's attention to the case of *Macon Grocery Co. v. Atlantic C. L. R. Co.*, 215 U. S. 501, *supra*, decided January 17. 1910; this case is a late and leading case and is controlling on what constitutes a case arising under the laws of the United States and therefore presents a Federal question and in the light of above opinion it seems clear that the case at bar without doubt presents a Federal question.

The action was commenced in the United States Circuit Court, and the object of the bill was to restrain the putting into effect by the interstate carriers, the railroad companies, proposed advanced rates on cer-

tain articles named in the bill, and the plaintiff's contention, in short, was that said increased rates were unlawful as well at common law as under the statutes of the United States.

The defendant railroad companies demurred to the jurisdiction, and each defendant asserting, in substance, an exemption from being sued in a district of which it was not an inhabitant. The above demurrer put the question of jurisdiction directly at issue in this case, and after citing the statute providing for the original jurisdiction of Circuit Courts of the United States, Mr. Justice WHITE delivered the opinion of the Court, and we quote the following therefrom on the Federal question involved therein:

"In *Patton v. Brady*, 184 U. S. 608, 46 L. Ed. 713, 22 Sup. Ct. Rep. 493, discussing the question as to when a case may be said to arise under the Constitution of the United States, the court observed:

It is said by Chief Justice MARSHALL that 'a case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either.' (*Cohen v. Virginia*, 6 Wheat. 264, 379, 5 L. Ed. 257, 285); and again, when 'the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction.' *Osborn v. Bank of United States*, 9 Wheat. 738, 822, 6 L. Ed. 204, 224. See also *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 201, 24 L. Ed.

656, 658; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648, *White v. Greenhow*, 114 U. S. 307, 29 L. Ed. 199, 5 Sup. Ct. Rep. 923, 962; *New Orleans, M. & T. R. Co., v. Mississippi*, 102 U. S. 135, 139, 25 L. Ed. 96, 97."

In *Tennessee v. Davis*, *supra*, the Court said:

"What constitutes a case, thus arising (under the laws of the United States) was early defined in the case cited from 6 Wheat. (*Cohen v. Virginia*.) It is not merely where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States wherever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege or claim, the protection or defense of the party, in whole or in part, by whom they are asserted. Story, Const., Sec. 1647; *Cohen v. Virginia*, 6 Wheat. 379, 5 L. Ed. 285. It was said in *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204, 'when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.' And a case arises under the laws of the United States when it arises out of the implication of the law.

In cases of the character of the one at bar, the rulings of the lower Federal Courts have uniformly been to the effect that they arose under the Constitution and laws of the United States. *Tift v. Southern R. Co.*, 123 Fed. 789, 793; *Northern P.*

R. Co. v. Pacific Coast Lumber Mfrs. Asso., 91 C. C. A. 39, 165 Fed. 1, 9; *Memphis Cotton Oil Co. v. Illinois C. R. Co.*, 164 Fed. 290, 292; *Imperial Colliery Co. v. Chesapeake & O. R. Co.*, 171 Fed. 589. And see *Suderland Bros. v. Chicago. R. I. & P. R. Co.*, 158 Fed. 877; *Jewett Bros. & Jewett v. Chicago, M. & St. P. R. Co.*, 156 Fed. 160. We are of opinion that the case before us may properly be said to be one arising under a law or laws of the United States. As said by TAFT, Circuit Judge, in *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 19, L. R. A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730:

‘It is immaterial what rights the complainant would have had before the passage of the interstate commerce law. It is sufficient that Congress, in the constitutional exercise of power, has given the positive sanction of Federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States’.”

In our opinion, the foregoing case and authorities cited therein, strongly supports our contention that there is a Federal question involved, and properly plead in the case at bar.

Defendants Demurrer is His Answer.

We respectfully submit that when defendant demurred to plaintiff's petition, he admitted all the allegations of plaintiff's petition, well pleaded. He has, therefore, answered by his demurrer, and he must stand by it. He has made his election, and by it he must stand or fall.

City of Aurora v. West, 74 U. S., 82;
Christmas v. Russell, 72 U. S., 290.

In *City of Aurora v. West*, *supra*, the court held that the rule is that a demurrer admits all such matters of fact as are sufficiently pleaded, and says the foundation for the rule is that the party demurring having had his option to plead or demur, shall be taken, in adopting the latter alternative, to admit that he has no grounds for denial or traverse.

In *Christmas v. Russell*, 72 U. S., *supra*, the court holds that whether general or special, a demurrer admits all such matters of fact as are sufficiently pleaded, and to that extent it is a direct admission. Apply this rule to the case at bar, and all facts that are sufficiently pleaded therein are admitted.

The defendant, having elected to demur instead of traversing or denying the allegations of plaintiff's peti-

tion, has rested his case, so far as pleading is concerned, and if this court sustains our contention that we have stated a Federal question in our petition, then it is the duty of this court to reverse and remand this case to the lower court, with directions to enter judgment for plaintiffs on the pleadings.

Angle v. Chicago, St. P. M. & A. Ry., 151 U. S. 1;
Sheffield Furnace Co. v. Witherow, 149 U. S., 574;
Commercial Mut. Acct. Co. v. Davis, 213 U. S., 245.

Respectfully submitted,

NAPOLEON B. MAXEY,
Attorney for Plaintiffs in Error.



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In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1913.

No. 338.

SIMON TAYLOR et al., - - - Plaintiffs in Error,

vs.

JOE ANDERSON et al., - - Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF OKLAHOMA.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

Defendants in error contend in their brief that the decision of the lower court is right because there is no federal question involved in this case, and in support of their contention cite a number of decisions of this court. After a careful reading of all the cases cited, we are of the opinion that the case of *Shulthis v. McDougal*, 225 U. S. 561, is the strongest case in support of their contention, but in our opinion counsel misconstrues what this court said in that case. On page 12 of his brief, he says:

"This court sustained a motion to dismiss the appeal for want of a federal question, saying in effect," and then quotes not what the court said, but his version of what the court meant to say.

What the court DID say in that case is in our opinion against defendants' contention and sustains ours. We will quote such paragraphs from that opinion (omitting the citations of authorities) as bear directly on the issue in this case.

"In opposing the motion, the appellants contend that the case arose under certain laws of the United States, presently to be mentioned, and therefore was not one in which the jurisdiction depended entirely on diversity of citizenship. The consideration of the contention will be simplified if, before taking up the specific grounds on which it is advanced, the rules by which it must be tested are stated. They are:

1. Whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, must be determined from the complainant's statement of his own cause of action, as set forth in the bill, regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings.

2. It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred argumentatively from the statements in the bill, for jurisdiction cannot rest on any ground that is not affirmatively and distinctly set forth.

3. A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not every suit to establish title to land in the central and western states would so arise, as all titles in those states are traceable back to those laws.

To sustain the contention that the suit was one arising under the laws of the United States, counsel for the appellants point out the statutes (Acts March 1, 1901, 31 Stat. L. 861, chap. 676; June 30, 1902, 32 Stat. L. 500, chap. 1323; April 26, 1906, 34 Stat. L. 137, chap. 1876 No. 22) relating to the allotment in severalty of the lands of the Creek Nation, the leasing and alienation thereof after allotment, the making of allotments to the heirs of deceased children, and the rights of the heirs, collectively and severally, under such allotments; but the bill makes no mention of those statutes or of any controversy respecting their validity, construction, or effect. Neither does it by necessary implication point to such a controversy. 'True, it contains enough to indicate that those statutes constitute the source of the complainant's title or right, and also shows that the defendants are in some way claiming the land, and particularly the oil and gas, adversely to him; but beyond this the nature of the controversy is left unstated and

uncertain. Of course, it could have arisen in different ways, wholly independent of the source from which his title or right was derived. So, looking only to the bill, as we have seen that we must, it cannot be held that the case as therein stated was one arising under the statutes mentioned. As was said in *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, 21 Mor. Min. Rep. 358, a controversy in respect of lands has never been regarded as presenting a federal question merely because one of the parties to it has derived his title under an Act of Congress."

It will be seen from the foregoing quotations that there was no statement of a federal question in the complaint in that case, but was only raised by the argument, and the court held it could not be raised in that way, but the question must appear in plaintiff's statement of his case. Such is not so in the case at bar. Here the plaintiffs not only set up what Acts of Congress have been violated by the defendants, but clearly show that this case cannot be decided without construing the statutes plead (see Second Amended Complaint, Rec., pp. 24-28), we quote two paragraphs therefrom:

"That the plaintiffs and the grantors in the before mentioned illegal deed to Joe Anderson had no power to convey said land on the date of said illegal deed and said illegal deed is repugnant to an Act of Congress, approved July 1, 1902 (32 Stat. L. 641), and to an Act of Congress approved April 26, 1906, and is an

impeachment and impairment of the title to said land of the plaintiffs derived from the United States under said Act of Congress, to the great property loss and damage of the plaintiffs and is repugnant to the Constitution of the United States and is null and void."

"That the defendants unlawfully and by force took possession of said land and unlawfully and by force retains possession of said land and the defendants have no title or interest in or to said land or any right of possession, and are trespassers on said land and said possession of said defendants is repugnant to the Act of Congress, approved July 1, 1902 (32 Stat. L. 641), and also to an Act of Congress approved April 26, 1906, and the plaintiffs invoke the protection of said Acts of Congress and of this court."

The above paragraphs from the Second Amended Complaint, taken with the other allegations, show clearly that the decision of this case depends upon a construction of the Acts of Congress plead therein, and a construction of said acts in the light of the decisions of this court must be in favor of the plaintiffs. Counsel for defendants in his brief, on page 13, referring to the case of *Mullen v. United States*, 224 U. S. 448, says:

"Let us illustrate for a moment. A and B, who are brothers, start to the land office to make a selection of land, and on the way, A dies. B gets to the land office and has with him his dead brother. Letters of administration are taken out on the estate of A for the purpose of mak-

ing selection, and a selection for A and B are made at the same time. It would be illogical to hold that the heirs could sell A's estate but could not sell B's, and we maintain that the reasoning of Justice HUGHES in the *Mullen-Johnson* case sustains this position."

Now let us see what the court DOES say. Quoting from that part of the opinion dealing with this question the court, after quoting section 16 of the Act of July 1st, 1902, says:

"It will be observed that the homestead lands are made inalienable 'during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.' The period of restriction is thus definitely limited, and the clear implication is that when the prescribed period expired, the lands were to become alienable; that is, by the heirs of the allottee upon his death, or by the allottee himself at the end of the twenty-one years. Thus, with respect to homestead lands, the Supplemental Agreement imposed no restriction upon alienation by the heirs of a deceased allottee. And the reason may be found in the fact that each member of the tribes—each minor child as well as each adult, duly enrolled as required—was to have his or her allotment; so that each member was already provided with a homestead as a part of the allotment, independently of the lands which might be acquired by descent. On the other hand, the proviso of paragraph 16—which relates to the additional portion of the allotment, or the so-called 'surplus' lands—contains a restriction upon alienation not only by the al-

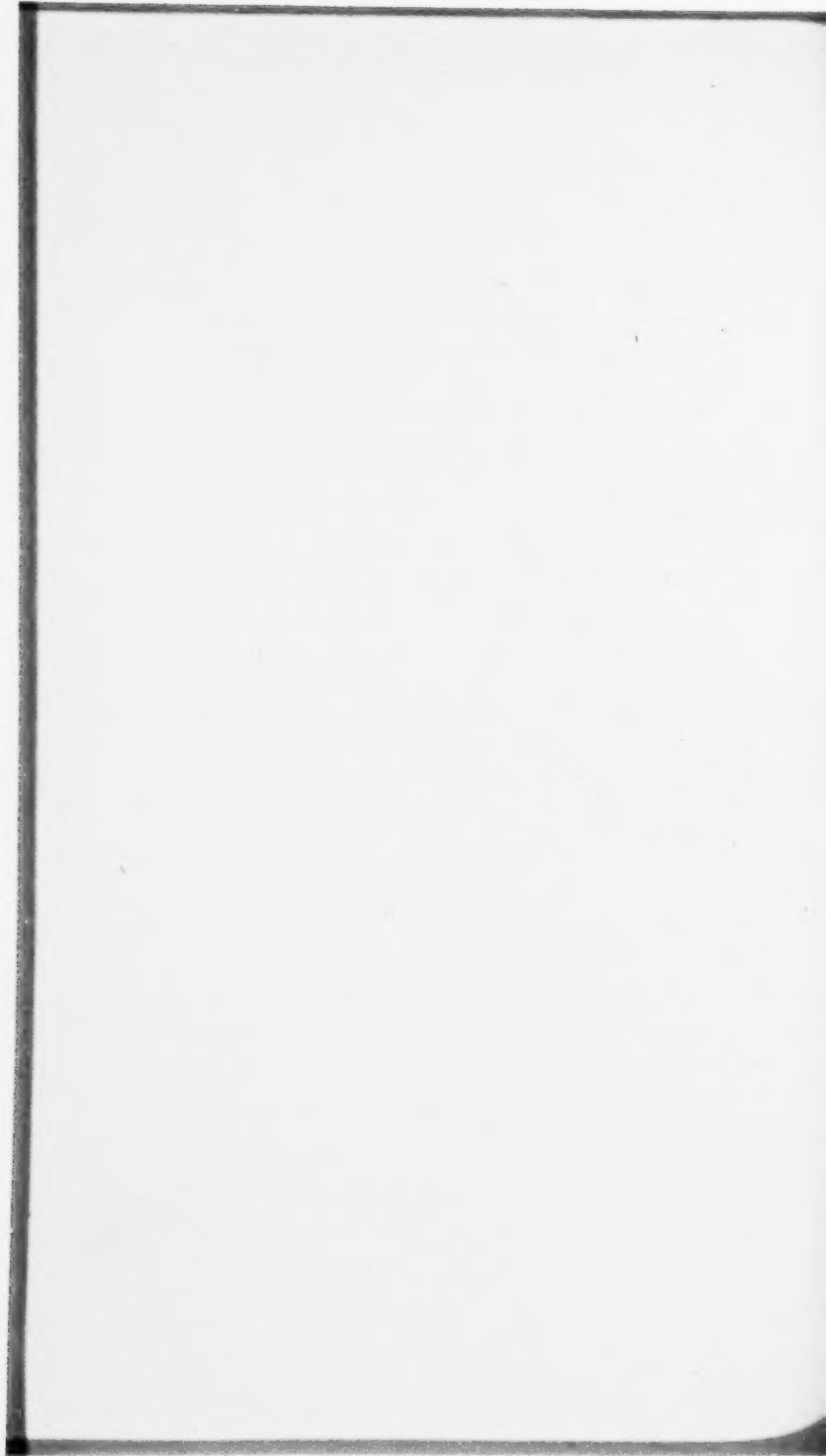
lottee, but by his heirs. Whatever may have been the purpose, a distinction was thus made with regard to the disposition by heirs of the homestead and surplus lands respectively."

The Second Amended Complaint shows that the land in controversy was allotted to Mary Mitchell, a full-blood Choctaw in her lifetime and that it descended to the plaintiffs as her heirs, who are also full-bloods, and under the decision of *Mullen v. United States, supra*, never has been alienable except with the approval of the Secretary of the Interior, or Probate Court.

Counsel for defendants in his brief cites certain sections of the Oklahoma Statutes and decisions of the Supreme Court of Oklahoma, which in our judgment have no application to this case. If this case had been brought in the state court, what law would have controlled its decision? The very Acts of Congress that we plead in our Second Amended Complaint, therefore, a federal question is necessarily involved.

We insist that defendants having elected to demur instead of pleading to the merits, that the judgment of the lower court should be reversed and judgment rendered for plaintiffs in error.

NAPOLÉON B. MAXEY,
Attorney for Plaintiffs in Error.



20
No. 338.

Office Supreme Court, U. S.

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IN THE
Supreme Court of United States

OCTOBER TERM, 1913.

SIMON TAYLOR, MELVINA TAYLOR, LEUS WILSON, LANE WILSON,
BICY WILSON, GEORGE VICTOR, NANCY VICTOR, By ELY P.
WILLIAMS, ELMOR WILLIAMS and CHARLES H. WILLIAMS, At-
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Plaintiffs in Error,

vs.

No. 338.

JOE ANDERSON, LABITHA ANDERSON, JESSE T. KINCANNON and
SIDNEY G. KINCANNON,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR

H. A. LEDBETTER,
Attorney for Defendants in Error.



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Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR

H. A. LEDBETTER,
Attorney for Defendants in Error.

STATEMENT.

This case comes to this court on appeal from the United States District Court, for the Eastern District of Oklahoma, final judgment having been entered herein March 4, 1911, dismissing this case for want of jurisdiction (Record, 41, 42).

On page 6 of the brief for the plaintiffs in error, we find the following:

"The plaintiffs' right of recovery in this suit is rested upon the second amended complaint (Record 24 to 28), which is in substance as follows:

"Plaintiffs first set up their cause of action in the statutory short form. They then set up their cause of action in detail. They show that the land in this suit was formerly a part of the tribal lands of the Choctaw Tribe of Indians; that it was allotted by Mary Mitchell, a full blood Choctaw Indian (as her share and portion other than homestead, of the lands of said tribe), under the Act of Congress of July 1, 1902 (32 Stat. L. 641,) commonly known and spoken of as the Choctaw-Chickasaw Supplemental Agreement; that by the terms of said agreement all allotted lands were inalienable for a period of one year, from and after the date of the patent by the allottee or the full blood heirs thereof.

"That the patent to Mary Mitchell is dated September 20, 1905, and Mary Mitchell died intestate before July 31, 1905, leaving plaintiffs her sole and only heirs who are full blood Choctaw Indians.

"That the deed of plaintiffs to Joe Anderson, under which the defendants claim title to said land, is dated July 31, 1905, and as this deed is dated before the patent was issued, it is apparent on the face of this deed that said land was not alienable thereunder, and that said deed is illegal and void.

"Plaintiffs contend that said illegal deed to Joe Anderson is repugnant to the Act of Congress of July 1, 1902 (32 Stat. L. 641), and the Act of Congress of April 26, 1906 (34 Stat. L. 137), and is repugnant to the constitution of the United States, and is an impeachment and impairment of the title to said land of plaintiffs derived from the United States, to their great property loss and damage, and is illegal and void."

We quote the following from plaintiffs' second amended complaint (Record 27).

"That the primary question to be determined in this case

involves a construction of the Acts of Congress above referred to, as it is the contention of the plaintiffs that the deed executed by plaintiffs to the defendant Joe Anderson is void by reason of the restriction on alienation contained in said Acts of Congress, and if plaintiffs' contention in this particular is not sustained, they must fail in this action; that it is the contention of the defendants that, notwithstanding the restriction imposed by said Acts of Congress, that plaintiffs had a right to convey at the time they executed said deed, and that the defendant, Joe Anderson, took good title, and if defendants' contention in this regard is sustained, the plaintiffs fail in this action, so that this case cannot be decided without a construction, by the court, of Acts of Congress above referred to. That the defendants unlawfully and by force took possession of said land and the defendants have no title or interest in or to said land, or any right of possession, and are trespassers on said land, and said possession of said defendants is repugnant to the Act of Congress, approved July 1, 1902 (32 Stat. L. 641), and also to an Act of Congress approved April 26th, 1906, and the plaintiffs invoke the protection of said Acts of Congress and of this court.

"That the above described lands are reasonably worth an annual rental value of the sum of \$250 per year, and that plaintiffs are entitled to recover that sum from the defendants as rent for said land for each year since January 1, 1906."

It is next contended by the plaintiffs in error, that the right to maintain this suit is given them by the Act of Congress of May 27, 1908 (35 Stat. L. 312, wherein, in said act it is provided:

"And said representatives of the Secretary of the Interior are further authorized, and it is made their duty to counsel and advise all allottees, adult or minor, having restricted lands, of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottees having restricted lands, he shall,

without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other incumbrance of any kind or character, made or attempted to be made or executed, in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands."

On page 20 of the record, it is shown that the original petition of the plaintiffs in error was filed in the trial court July 15, 1908, and we can hardly see how it could be contended that the Act of Congress of May 27, 1908, *supra*, gave the right to the plaintiffs in error to file their suit in the United States Court, for said Act of Congress did not become effective until sixty days after its passage. See Act of Congress May 27, 1908 (35 Stat. L. 312), section 1 thereof, but be that as it may, we will take up this question later.

To the complaint as amended, a demurrer to the jurisdiction of the court was interposed for the reason that no federal question was involved. See Record page 28.

This demurrer was sustained. See Record pages 29 to 42 inclusive.

From the judgment sustaining the demurrer to the jurisdiction of the court, an appeal is taken to this court, and on page 6 of the brief for the plaintiffs in error, it is shown that the assignments of error 1 and 2 are waived, and the only error relied upon, is the third assignment of error, which is as follows, to-wit:

The court erred in dismissing the second amended complaint of plaintiffs in error, for want of jurisdiction, and rendering judgment against them for costs.

BRIEF AND ARGUMENT

Commencing on page 24 of the record will be found the second amended complaint.

This complaint contains allegations that might be termed a "duke's mixture," for it is alleged therein that the plaintiffs in error are the owners of the title in fee to certain lands therein described; that the defendants are in the unlawful possession of said lands, claiming the same as their own, and refuse to surrender possession to plaintiffs or attorn to them for the rents and profits arising from said land.

The complaint then charges that the matter in dispute in the suit exceeds \$5,000 and arising under the Constitution or laws of the United States or Treaties.

The complaint then charges that plaintiffs derived their title through one Mary Mitchell, a full blood Choctaw Indian, the allottee of the land, and to whom the Choctaw and Chickasaw Nations executed an allotment patent, and then it is charged that the land was restricted in the hands of Mary Mitchell as well as her heirs by reason of section 16 of the Act of Congress approved July 1, 1902 (32 Stat. L. 641), and that the conveyance made by the plaintiffs in error as heirs of Mary Taylor deceased, which conveyance was dated July 31, 1905, was violative of the Act of Congress approved July 1, 1902 (32 Stat. L. 641), as well as the Act of Congress of April 26, 1906 (34 Stat. L. 137).

There is no diversity of citizenship alleged or claimed, but it is the contention of the plaintiffs in error that by reason of the fact that they are citizens by blood of the Choctaw Tribe of Indians, and by reason of the allegations in the complaint whereby the title of the plaintiffs in error is deraigned, that these allegations presented a federal question.

The trial court did not think so and dismissed the suit for want of jurisdiction. See opinion of the trial court, commencing on page 29 of the record.

This opinion is so exhaustive of the authorities on the question involved, that we hardly think any more need be said, but we will call the court's attention to the following:

It appears to us that the plaintiffs in error have been misled into an erroneous view of what is necessary to maintain the action of ejectment.

In re Boyd vs. Cowan, 4 Dall. 138 (11 Ed. 774), it is said:

"Ejectment is an action invented for the speedy trial of titles to the possession of lands."

In re McArthur vs. Porter, 6 Pet. 205 (8 L. Ed. 371) it is said:

"The action of ejectment is a fictitious action, and is moulded by courts to subserve the purposes of justice, in a manner peculiar to itself; its professed object is to try the titles of the parties."

In re Gregg vs. Von Phul, 1 Wall. 374 (17 Law Ed. 536), it is said:

"The action of ejectment is to recover possession of the land in question; and the judgment, if carried into execution, must be followed by delivery of possession to the lessor of the plaintiff. The purpose for which the action is brought is not to try the mere abstract right to the soil, but to obtain actual possession."

By section 6122 of Snyder's Compiled Laws of Oklahoma, it is provided:

"In an action for the recovery of real property, it shall be sufficient if a plaintiff state in his petition that he has the legal or equitable estate therein and is entitled to the possession thereof, describing the same as required by section 5067, and that the defendant unlawfully keeps him out of

possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived."

Section 5667, referred to in the foregoing section, provided that the land shall be described with such convenient certainty as will enable an officer holding execution to identify it.

By section 6123 it is provided:

"That it shall be sufficient in such action if the defendant in his answer deny generally the title alleged in the petition, or that he withholds the possession, as the case may be; but if he deny the title of the plaintiff, possession by the defendant shall be taken as admitted."

Under the foregoing statute, the Supreme Court of Oklahoma has said that the plaintiff must recover on the strength of his own title and not the weakness of the defendant. See the following cases: *Hurst vs. Sawyer*, 2 Okla. 470; 94 Pac. Rep. 522; 100 Pac. Rep. 1122; 100 Pac. Rep. 543; 110 Pac. Rep. 260; 120 Pac. 943; also page 1084; 124 Pac. Rep. 971; 133 Pac. Rep. 51.

This same doctrine is followed by this court in a long line of cases, using the following language:

"It has been long and well established, as a rule of law and equity, that a party must recover on the strength of his own title, and not on the weakness of his adversary's title."

See the following cases: 100 U. S. 142; 108 U. S. 166; 194 U. S. 356; 181 U. S. 516; 180 U. S. 50; 160 U. S. 303; 150 U. S. 332; 140 U. S. 400.

And if it appear that the legal title is in another, whether that other be the defendant, the commonwealth, or some third person, it is sufficient to defeat the plaintiff. See *King vs. Mullins*, 171 U. S. 404.

Let us illustrate for a moment, and see the attitude the plaintiffs in error would be in in the trial of this case, and see whether a

federal question would necessarily be involved. The first thing that would be done, would be to introduce the patent showing the allotment of the land to Mary Mitchell; then it would be shown that Mary Mitchell was dead and that the plaintiffs were the heirs of Mary Mitchell, which heirship would be under the local law; it would then be shown that the defendants were in possession of the land, and that they had used and enjoyed the same, and it would then be shown that the land is of a certain reasonable rental value. Under such circumstances, if no testimony was offered by the defendants, judgment would be entered for the plaintiffs for possession of the land, and such damages as the evidence disclosed. Would any Act of Congress, or Treaties of any Indian Tribes have to be construed?

The plaintiffs in error by their complaint have anticipated that the defendants will assert a title and right to possession of the land under a certain deed, and that in order to decide whether the deed was a lawful one, that the court will necessarily have to construe the Act of Congress approved July 1, 1902 (32 Stat. L. 641).

In re Tennessee vs. Union & P. Bank, 142 U. S., at page 460, it is said:

"The question whether a party claims a right under the Constitution or laws of the United States, is to be ascertained by the legal construction of its own allegations, and not by the effect attributed to these allegations by the adverse party."

See also *Central R. C. of N. Y. vs. Mills* (113 U. S. 249).

In *Filhoil vs. Maurice*, 185 U. S. 108, it is said:

"It is settled that in order to give the Circuit Court of the United States jurisdiction of a case so arising, it does so arise must appear from the plaintiffs' own statement of his claim."

In re H. & T. C. R. Co. vs. Texas, 177 U. S., it is said in the syllabus:

"The federal character of a suit must appear in the plaintiffs' own statement of his claim, and a defense has been interposed, the reply to which brings out matters of a federal nature; those matters thus brought out by the plaintiff do not form a part of his cause of action."

See also *Oregon & C. Ry. Co. vs. Skottowe*, 162 U. S. 490;

Galveston, Harrisburg, etc. Ry. vs. Texas, 170 U. S. 226.

It will be noted from the authorities *supra*, that this court said that the federal question must appear from the *necessary* statements by the plaintiff. And even in construing plaintiffs' statement of his cause of action, statements he may make therein which are unnecessary are not to be considered as showing jurisdiction in the federal court.

This doctrine is also sustained by the case of *Joy vs. St. Louis*, 201 U. S. 478, wherein it is said:

"This original jurisdiction, it has been frequently held, must appear by the plaintiffs' statement of his own claim, and it cannot be made to appear by the assertion in the plaintiff's pleadings that the defense raises or will raise a federal question. As has been stated, the rule is a reasonable and just one, that the complainant in the first instance shall be confined to a statement of his cause of action, leaving to the defendant to set up in his answer what his defense is, and if anything more than a denial of plaintiffs' cause of action, imposing upon the defendant the burden of proving such defense."

In re Cook County vs. Calumet & C. C. Co., 138 U. S. 635, it is said:

"The validity of a statute is not drawn into question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

And to the same effect, 175 U. S. 639; 96 U. S. 199 and 152 U. S. 454.

In the case of *Filhoil vs. Maurice*, 185 U. S. 108 *supra*, it is said:

"But no right, title, privilege, or immunity was here asserted as derived from the Constitution or the treaty, as against these private individuals, who were impleaded as defendants, either specially, or through averments that plaintiffs were ousted in violation of the treaty and of the fifth amendment, the provisions of which it was the duty of the federal government to observe. The gravamen of the complaint was that plaintiffs' ancestor had a perfect title, to which they had succeeded, and the appropriate remedy for illegal invasion of the rights of possession was sought; but it was not made to appear that the Circuit Court had jurisdiction, for the action was not against the United States, nor could it have been, as the United States had not consented to be so sued, and, so far as defendants were concerned, it was not charged that they took possession by direction of the government, and plaintiffs set up no more than a wrongful ouster by merely private persons remediable in the ordinary course, and in the proper tribunals."

We beg now to call the court's attention to the case of *Florida Central and Peninsular Railroad Company vs. Bell et al.*, 176 U. S. 321 (44 Law Ed. 486), *syllabus* two of which is as follows:

"A plaintiff whose statement of his own claim does not disclose a federal question cannot create jurisdiction in a circuit court by anticipating the defendants' claim and by alleging that the defendant will set up a defense under some law of the United States."

At the bottom of page 327 of this case, it is said in the body of the opinion:

"Where, however, the original jurisdiction of a circuit court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question

of a federal nature, it must appear at the outset, from the declaration or the bill of the party suing, that the suit is one of that character; in other words, it must appear in that class of cases that the suit was one of which the circuit court, at the time its jurisdiction is invoked, could properly take cognizance. *If it does not appear, then the court, upon demurrer or motion or upon its own inspection of the pleadings, must dismiss the suit*, just as it would remand to the state court a suit which the record at the time of its removal, failed to show was within the jurisdiction of the circuit court. It cannot retain it in order to see whether the defendant may not raise some question of a federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction at the commencement of the suit is not cured by an answer or plea which may suggest a question of that kind," citing 128 U. S. 588; 150 U. S. 138; 162 U. S. 490; 163 U. S. 273, and 164 U. S. 105.

Following, the court said:

"The paragraph of the declaration which sets forth the plaintiffs' claim is as follows: 'The plaintiffs allege that they claim title to the said land under and by virtue of a patent granted by the government of the United States of America to the said Louis Bell and his heirs, upon a pre-emption claim for said land under the laws of the United States, originally commenced and filed in the local land office of the United States of America at Gainesville, Florida, in 1883, and prosecuted by the heirs of the said Louis Bell and his heirs, the plaintiffs, in said land office; and upon appeal in the General Land Office of the government, and upon and from an appeal from the decision of the Commissioner of the said General Land Office to the secretary of the interior of the United States, the said heirs prosecuted the pre-emption claim until, by the order and decision of the said secretary, the said patent was granted.' In view of the frequent and recent decisions of this court on this subject, it is not necessary to argue the proposition that the mere assertion of a title to land de-

rived to the plaintiffs under and by virtue of a patent granted by the United States, presents no question which, of itself, confers jurisdiction on a circuit court."

In the case of *Shulthis vs. McDougal*, 225 U. S. 561, this court sustained a motion to dismiss the appeal for want of a federal question, saying in effect:

"A suit involving rights to allotted land of the Five Civilized Tribes acquired under the laws of the United States does not arise under that law for jurisdictional purposes, unless it involves a dispute as to the validity or effect of such law, and in determining whether a federal question is presented, you must look to the bill of the complainants alone, leaving out of the bill all argumentative matters."

If this was not the rule, practically every suit to establish title to land in the central and western states would so arise, as all titles in those states are traceable back to the laws of the United States.

It appears to us that the two cases last cited and the case of *Joy vs. St. Louis*, being ejectment cases, would control the question in the case at bar, and would also appear that the proper procedure is by demurrer or motion to dismiss, just as was done in the case at bar.

It is true that the demurrer of the defendants in error to the complaint admitted all the allegations well pleaded, but it did not admit all those *unnecessary allegations*, whereby the title of the plaintiffs in error was deraigned as well as how the defendants held possession and title to the land. As shown herein, the plaintiffs in error must recover on the strength of their own title and not the weakness of the defendants in error.

The defendants in error, if required to answer, could file a general denial, and under this general denial, they could show how and in what manner they held the title and possession of the land. The

testimony of the defendants in error so far as this court knows might show that Mary Mitchell died prior to selection, and following the decision of *Mullen-Janson vs. U. S.*, 224, U. S. 448, the heirs of Mary Mitchell, plaintiffs in error herein, had the right of alienation and full title was conveyed, or we might say that it makes no difference whether Mary Mitchell, the allottee, died before or after selection, the heirs had the right of alienation, for the restriction was personal and when Mary Mitchell died, the heirs having inherited the land under Chapter 49 of *Mansfield Digest*, the right of alienation would necessarily be governed by the law which created the estate in the hands of the heir, and although by section 16 of the Act of Congress approved July 1, 1902 (32 Stat. L. 641), it is provided in substance that such heirs may alienate the land inherited by them during the existence of the trial government, provided the land is sold for the appraised value.

Let us illustrate for a moment. A and B, who are brothers, start to the land office to make a selection of land, and on the way, A dies. B gets to the land office and has with him his dead brother. Letters of administration are taken out on the estate of A for the purpose of making selection, and a selection for A and B are made at the same time. It would be illogical to hold that the heirs could sell A's estate but could not sell B's, and we maintain that the reasoning of Justice Hughes in the *Mullen-Johnson* case sustains this position.

And if, by a technical construction of section 16 of the Act of Congress approved July 1, 1902 (32 Stat. L. 641), the heirs could not sell by reason of the fact that the act provided a time limit after patent issued before the heirs could sell, then we say that by the Act of Congress of April 26, 1906 (34 Stat. L. 144, chap. 176), this objection would be met, for there it is said:

"Provided further, that conveyances heretofore made by

members of any of the Five Civilized Tribes subsequent to the selection of allotment, and subsequent to removal of restrictions, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed," etc.

In other words, death operated to remove the restrictions as to the person and the Act of Congress *supra* removed the obstacle of the patent not being issued a sufficient time. See *Mullen-Janson vs. United States supra*.

THE ACT OF CONGRESS OF MAY 27, 1908, DID NOT
CONFER JURISDICTION ON THE COURT.

On page 20 of the record, it is shown that this suit was filed in the trial court July 15, 1908, and by the Act of Congress of May 27, 1908, section 1 thereof, it is specifically provided that the said act should not become operative until 60 days after its passage, and certainly it would not be contended that this act had a retro-active effect, and if it did, then we say that nowhere in the act is there any language susceptible of such a construction contended for by the plaintiffs in error. The Act of Congress of May 27, 1908 (35 Stat. L. 312), merely authorized the representatives of the Secretary of the Interior to sue for the Indians of the restricted class, but nowhere in said act does it provide where such suits are to be maintained, and it is our position that the representatives of the Secretary of the Interior would have to pitch their suit in the proper forum, just as any other litigant, and especially so, until Congress had granted authority to maintain such suits for the restricted Indians in the federal court.

We have gone over the authorities cited by the plaintiffs in error and feel safe in saying that they do not bear upon the question in the case at bar.

Plaintiffs in error conclude their brief by saying that the demurrer of the defendants in error, for want of jurisdiction in the trial court, admitted all the facts of the complaint well pleaded, and they further say that by such pleading we have elected to stand on the demurrer, and in the event the position of plaintiffs in error is sustained, then they say there is nothing for this court to do other than to reverse and remand this case to the court below, with directions to enter judgment for them.

The cases of *City of Aurora vs. West*, 74 U. S. 82, and *Christmas vs. Russell*, 72 U. S. 290, are cited to support this contention. We have carefully read these cases and can not agree that such is the holding. What the court held was

"That on the overruling of a demurrer, judgment for the plaintiff is final *if the merits are involved.*"

The merits of the case at bar have not been inquired into by the trial court, and it would be a strange construction of an appeal on the question of JURISDICTION ALONE to enter judgment as is contended for by the plaintiffs in error.

We have examined the other cases in support of their contentions in this regard, the cases being 151 U. S. 1; 149 U. S. 574, and 213 U. S. 245, and fail to find that they support the contentions relied upon.

We respectfully submit that the judgment of the trial court in sustaining the demurrer was correct, and that said judgment should be affirmed.

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